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No. 89——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COMMUNICATIONS SATELLITE CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. May the Federal Communications Commission fail to follow the specific ratemaking provisions of the Communications Act, which establishes a system of prospective rate regulation, and instead require a carrier to refund revenues, collected pursuant to its effective rates, in order to enforce an extra-statutory ceiling on earnings?

2. Does a Commission order establishing a carrier's allowed rate of return remain operative after the Commission has knowingly permitted rates, which were designed to achieve a higher rate of return, to go into effect?

PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the Court of Appeals:

Petitioner: Communications Satellite Corporation ("COMSAT") was the sole petitioner. COMSAT has no parent corporation, and all of its subsidiaries are wholly-owned.

Intervenors: American Telephone & Telegraph Company, Bell Atlantic Telephone Companies, Capital Cities/ABC, Inc., CBS, Inc., FTC Communications, Inc., MCI Communications Corporation, National Broadcasting Company, Inc., Nevada Bell, Pacific Bell, Pacific Telecommunications, Inc., RCA Global Communications, Inc., Southwestern Bell Telephone Company, Turner Broadcasting System, Inc., TRT Communications Corporation.

Respondents: Federal Communications Commission and the United States of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The opinion of the D.C. Circuit in the case here under review (Pet. App. at 1a-2a) is not reported. The decision below was based solely on *New England Telephone & Telegraph Co. v. FCC* (Pet. App. at 36a-73a), which is reported at 826 F.2d 1101. The opinions accompanying the orders denying rehearing *en banc* in this case (Pet. App. at 75a) and *New England* (Pet. App. at 76a-78a) are not reported. The order of the Federal Communications Commission in the instant case (Pet. App. at 3a-35a) is reported at 3 FCC Rcd 2644 and at 64 Rad. Reg. (P&F) 524.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals (Pet. App. at 1a-2a) was entered on November 17, 1989. Communications Satellite Corporation's petition for rehearing and

suggestion for rehearing *en banc* were denied on February 2, 1990 (Pet. App. at 74a-75a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS

The relevant statutory provisions are Sections 4(i), 203, 204, and 205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 203, 204, 205 (1982). They are reprinted in Petitioner's Appendix F.

STATEMENT OF THE CASE

This case squarely presents the question of whether a federal regulatory agency may rewrite its governing statute, displacing the prospective ratemaking provisions enacted by Congress with an extra-statutory scheme of retroactive ratemaking. The order at issue in this case requires Communications Satellite Corporation ("COMSAT") to refund $38 million in revenues that it collected between August 1984 and December 1986 pursuant to its tariffs lawfully on file with the Federal Communications Commission ("FCC" or "Commission"). The Commission concedes that it did not comply with the specific refund procedures in Section 204 of the Communications Act ("the Act"), which provides a carefully circumscribed exception to the rule against retroactively reducing a carrier's filed rates. Nonetheless, the Commission claims, the general grant of authority contained in Section 4(i) of the Act—which authorizes the agency to take action "not inconsistent" with the terms of the Act that is "necessary in the execution of its functions"—permits it to order the refund.

This case had its origin in 1978, when the FCC prescribed an 11.48% rate of return for COMSAT (with one additional percentage point for efficiencies), and directed COMSAT to file tariffs designed to produce that

return.[1] COMSAT complied with this order by filing tariffs designed to attain that return in May 1978, which the FCC permitted to go into effect. In response to the high level of inflation during the late 1970's and early 1980's, COMSAT subsequently filed a series of revised tariffs, which it informed the FCC were designed to achieve a higher rate of return. The FCC permitted these tariffs to become effective as well.[2]

In 1984, the FCC ordered COMSAT to file new tariffs that were "to be in compliance with its authorized rate of return (11.48%-12.48%)."[3] COMSAT contested this order, arguing that the FCC's 1978 rate of return prescription was no longer operative because of changed circumstances.[4] The Commission rejected COMSAT's argument.[5]

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[1] *Communications Satellite Corp.*, 68 F.C.C.2d 941, 950-51 (1978), *recon. denied*, 70 F.C.C.2d 1449 (1979). The Commission has stated that it prescribes "a range of rate of return . . . to provide a carrier with the incentive, on a rate schedule designed to yield a return at the low end of the range, to achieve a return at the upper end of the range through operating and internal efficiencies." *Communications Satellite Corp.*, 56 F.C.C.2d 1101, 1173 (1975), *modified*, 68 F.C.C.2d 941 (1978).

[2] *See Communications Satellite Corp.*, 3 FCC Rcd 2643, 2644, 2646 (1988) (*"1988 Refund Order"*), *summarily aff'd*, No. 88-1243 (D.C. Cir. Nov. 17, 1989), *reh'g and reh'g en banc denied* (D.C. Cir. Feb. 2, 1990).

[3] *Changes in Corporate Structure & Operations of the Communications Satellite Corp.*, 97 F.C.C.2d 145, 179, *recon. denied in part*, 99 F.C.C.2d 1040 (1984).

[4] COMSAT Petition for Reconsideration at 23-24 (June 4, 1984). COMSAT further argued that if the 1984 order was intended to reimpose the 11.48-12.48% prescription, the Commission could not do so without first conducting a hearing as required by Section 205 of the Communications Act. *Id.* at 23.

[5] *Changes in the Corporate Structure & Operations of the Communications Satellite Corp.*, 99 F.C.C.2d 1040, 1054-56 (1984).

While preserving its objections,[6] COMSAT filed tariffs in June 1984 that were designed to generate the rate of return specified by the Commission. These tariffs, which reduced COMSAT's existing charges, were permitted to become effective on August 1, 1984.[7] In February and June 1985, COMSAT filed additional tariffs, which further reduced its rates. The Commission permitted both sets of tariffs to go into effect.[8]

In November 1985, the FCC released an order initiating an investigation of the tariffs filed earlier in 1985. The order expressly noted that COMSAT had "revised its rates [in June 1985] to achieve an 11.48 percent rate of return."[9] Although the FCC had not suspended the rates before they become effective, the order purported to make them subject to an accounting order.[10]

On April 6, 1987, the Commission issued an order which asserted that COMSAT had violated the 1978 rate of return prescription because the rates that were in effect between August 1984 and December 1986 had yielded a rate of return in excess of the level specified. Purporting to act under its Section 4(i) authority, the FCC directed COMSAT to remedy this "violation" by refunding

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[6] *See* COMSAT Transmittal Letter No. 546, at 2 (Feb. 1, 1985).

[7] *Communications Satellite Corp.*, CC Docket No. 80-634, Memorandum Opinion and Order, Mimeo No. 5797, at ¶ 13 (Common Carrier Bur., released Aug. 2, 1984). The Common Carrier Bureau denied several petitions to suspend or reject the June 1984 tariff filings. The order initiated an investigation of those tariffs, but stated that the issues to be investigated would be specified in a subsequent order.

[8] *See Communications Satellite Corp.*, 3 FCC Rcd 7164, 7165 (1988).

[9] *Communications Satellite Corp.*, CC Docket Nos. 80-634 & 85-268, Memorandum Opinion & Order, Mimeo No. 0672, at ¶ 6 (Common Carrier Bur., released Nov. 8, 1985), *modified by erratum*, Mimeo No. 1703 (Common Carrier Bur., released Dec. 27, 1985).

[10] *Id.* at ¶¶ 47-52.

all money collected during this period in excess of a 12.48% return.[11]

COMSAT contested the FCC's order, arguing that, under the prospective ratemaking system enacted by Congress, the FCC could not order COMSAT to make refunds because the agency had not employed the specific procedures contained in Section 204 of the Act, which is the section of the Act that governs refunds. COMSAT contended, among other things, that Section 204 authorizes the FCC to order refunds only if it challenges the carrier's rates at the time they are filed by suspending them and identifying specific components for investigation; that refunds may be ordered only when a carrier has filed rates for a new service or has increased its rates for an existing service; and that refunds must be based on a finding that one or more components of the carrier's rates was unlawful when filed.[12] COMSAT further argued that the FCC could not use its general authority under Section 4(i) to circumvent the specific statutory procedures.[13] Finally, COMSAT stressed that, even if the Commission has the authority to order a carrier to refund revenues in excess of its prescribed rate of return, it had not validly exercised that authority in the instant case because the 1978 order prescribing an 11.48-12.48% rate of return—which the 1988 refund order was intended to "enforce"—had ceased to be in effect in 1979, when the Commission knowingly allowed rates targeted to a higher rate of return to become effective.[14]

The FCC concluded its investigation on December 8, 1988, resolving all issues designated in the investigation

[11] *Communications Satellite Corp.*, 2 FCC Rcd 3706, 3716-18 (1987), *modified*, CC Docket Nos. 80-634 & 85-268, Modification of Order, DA 87-526 (Common Carrier Bur., released May 4, 1987).

[12] Communications Satellite Corporation's Response to Show Cause Order at 13-24 (May 15, 1987).

[13] *Id.* at 10 n.18.

[14] *Id.* at 25-32.

order in COMSAT's favor.[15] The FCC, however, reaffirmed its finding that COMSAT had violated the 1978 rate of return prescription. The Commission refused to consider any of COMSAT's legal arguments on the ground that in *New England Telephone & Telegraph Company v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989), the Court of Appeals for the District of Columbia Circuit held that the Commission could use its general authority under Section 4(i) of the Communications Act to enforce a valid rate of return prescription by ordering refunds.[16] COMSAT then filed a petition for review of the refund order with the D.C. Circuit; the case was held in abeyance pending disposition of the petition for rehearing *en banc* in *New England*.[17]

A four-member plurality of the D.C. Circuit subsequently denied rehearing *en banc* in *New England*.[18] Three judges dissented, criticizing the *New England* decision as "badly wrong." [19] The FCC, they observed, had

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[15] *Communications Satellite Corp.*, 3 FCC Rcd at 7167-69.

[16] *1988 Refund Order*, 3 FCC Rcd at 2645.

[17] *Communications Satellite Corp. v. FCC*, No. 88-1243, Order to Hold in Abeyance (May 17, 1988).

[18] *New England*, No. 85-1087, Order Denying Rehearing *En Banc* (D.C. Cir. Nov. 2, 1988). The court also declined to rehear *en banc* a closely related case, *American Telephone & Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T*"). *See AT&T*, No. 85-1778, Order Denying Rehearing *En Banc* (D.C. Cir. Nov. 2, 1988) (amended Nov. 23, 1988). In that case, two members of the panel (Judges Mikva and Bork) had concluded that the earlier *New England* decision foreclosed consideration of the question whether the Commission could use a rate of return/refund approach, but found that the rule adopted by the Commission to implement this approach was arbitrary and capricious. *AT&T*, 836 F.2d at 1390-91. A third member of the panel, Judge Starr, concurred in the judgment, but found that the Commission's ratemaking scheme was inconsistent with the "terms and structure" of the Communications Act. *Id.* at 1395 (Starr, J., concurring in judgment).

[19] *New England*, Order Denying Rehearing *En Banc* at 2 (Starr, Williams, & Buckley, JJ., dissenting).

"purported to exercise a power which Congress never conferred upon it" and had adopted a scheme that "do[es] violence to well-settled, salutary doctrines, such as the bar on retroactive ratemaking and the filed rate doctrine." However, they recognized that "the substantial shortage in judicial personnel" resulting from the recusal of four members of the court "virtually foreordained" that the *New England* decision could not "be afforded the *en banc* treatment that it so plainly deserves." [20] This Court subsequently denied *certiorari*.[21]

In light of the panel decision in *New England*, COMSAT sought a hearing of its case by the D.C. Circuit *en banc*.[22] The court denied this request.[23] The Commission subsequently moved to have the COMSAT refund order summarily affirmed, without briefing or oral argument, on the ground that the COMSAT case was controlled by the court's decision in *New England*.[24] COMSAT opposed this motion, arguing that the panel decision there was not entitled to the full precedential weight normally accorded decisions in the circuit and that, in any event, *New England* did not control the question of whether the 1978 rate of return prescription was still in effect during the 1984-1986 period covered by the FCC's refund order.[25] On November 17, 1989, a panel of the Court of Appeals granted the Commission's motion for summary affirmance, stating that "[t]he issues presented in the petition for review are controlled by this court's decision in *New England Telephone & Telegraph Co. v. FCC*, which is binding precedent in this circuit until re-

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[20] *Id.*

[21] *Southern Bell Tel. & Tel. Co. v. FCC*, 109 S. Ct. 1942 (1989).

[22] COMSAT Suggestion for Hearing *En Banc* (May 23, 1989).

[23] *Communications Satellite Corp. v. FCC*, No. 88-1243, Order Denying Suggestion for Hearing *En Banc* (D.C. Cir. Aug. 3, 1989).

[24] FCC Motion for Summary Affirmance at 1 (Aug. 11, 1989).

[25] COMSAT Opposition to FCC Motion for Summary Affirmance at 16-19 (Sept. 22, 1989).

jected by the court *en banc* or overruled by the Supreme Court." [26]

COMSAT filed a petition for rehearing and a suggestion for rehearing *en banc*.[27] On February 2, 1990, the petition for rehearing was denied and a four-member plurality of the Court of Appeals voted to deny the suggestion for rehearing *en banc*.[28] Three members of the court dissented,[29] and two members recused themselves.[30]

REASONS FOR GRANTING THE WRIT

In the present case, the Federal Communications Commission has issued an order requiring Petitioner to refund revenues collected pursuant to rates that the Commission previously allowed to go into effect. The procedures used did not comply with the specific ratemaking provisions contained in Sections 203 through 205 of the governing statute. Rather, the Commission asserted that its general authority under Section 4(i) of the Communications Act, which permits it to take actions not inconsistent with the Act, enables it to adopt its own retroactive ratemaking scheme.

Petitioner respectfully submits that this case merits consideration by the Court because it raises an important question of law that has not been, but should be, resolved by this Court: whether the FCC can replace the statutory scheme of prospective ratemaking set forth

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[26] *Communications Satellite Corp. v. FCC*, No. 88-1243, Order Granting Summary Affirmance (D.C. Cir. Nov. 17, 1989) (Wald, C.J., Edwards & Silberman, JJ.) (citation omitted).

[27] COMSAT Petition for Rehearing and Suggestion for Rehearing *En Banc* (Dec. 18, 1989).

[28] *Communications Satellite Corp. v. FCC*, No. 88-1243, Order Denying Petition for Rehearing (D.C. Cir. Feb. 2, 1990) (Wald, C.J., Edwards & Silberman, JJ.); *Communications Satellite Corp. v. FCC*, No. 88-1243, Order Denying Suggestion for Rehearing *En Banc* (D.C. Cir. Feb. 2, 1990).

[29] Order Denying Suggestion for Rehearing *En Banc* (Williams, Buckley, Sentelle, JJ., dissenting).

[30] *Id.* (Ginsburg, R.B. & Ginsburg, D.H., JJ., recused).

in the Communications Act with an FCC-devised scheme of retroactive rate regulation. Although the Court has not passed on this precise question, Petitioner further submits that this case merits consideration because the decision of the D.C. Circuit conflicts with numerous decisions of this Court and the courts of appeals construing substantially similar ratemaking provisions of other federal statutes.

The fact that this case involves the interpretation of the ratemaking provisions of the Communications Act, which are virtually indistinguishable from the ratemaking provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10704, 10708, & 10762 (1982 & Supp. IV 1986), the Federal Power Act, 16 U.S.C. §§ 824d-824e (1988), and the Natural Gas Act, 15 U.S.C. §§ 717c-717d (1988), significantly enhances the importance of this case. If allowed to stand, the decision of the court below would have far-reaching implications for a host of industries subject to federal rate regulation, touching virtually every aspect of the economy. Moreover, the ability of an agency to rewrite its governing statute, substituting its policy preferences for the express choices made by Congress, raises a significant issue that extends beyond ratemaking to the full spectrum of agency activity.

The D.C. Circuit is the court most frequently called upon to review actions of federal regulatory agencies. Since *New England*, the decisions of that court regarding the limits on retroactive ratemaking and the ability of an agency to use its general authority to displace specific statutory provisions have been strikingly inconsistent, depending on the agency involved. Indeed, since issuing the decision in the present case, the D.C. Circuit has again applied the basic principles of federal ratemaking in cases involving the Federal Energy Regulatory Commission. As a result, the "state of the law in [the D.C.] Circuit on a pivotal statutory issue cutting across agency lines can only be regarded as distressingly un-

settled."[31] This is especially problematic because of the large number of pending cases that turn on these issues. In these circumstances, the need to resolve this intra-circuit conflict further justifies the exercise of this Court's *certiorari* jurisdiction.[32]

I.

Sections 203 through 205 of the Communications Act reflect a carefully crafted congressional approach to rate-making, first embodied in the Interstate Commerce Act, and subsequently incorporated in the Federal Power Act and the Natural Gas Act.[33] Each statute provides that once a common carrier's rates have gone into effect, those are the rates the carrier must charge and the customer must pay. Like the other statutes, the Communications Act provides two methods for revising a carrier's filed

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[31] *New England*, 85-1087, Order Denying Rehearing *En Banc* at 2 (Starr, J., dissenting).

[32] *Compare Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948) (*Certiorari* granted in bankruptcy case because of intra-circuit conflict in the circuit most frequently required to resolve disputes arising under the Bankruptcy Code).

[33] The Senate Report on the bill that became the Communications Act observed that the ratemaking provisions of the Act were adapted from portions of Sections 6, 15, and 16 of the Interstate Commerce Act. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934). It is well settled that these statutes should be construed consistently. *See, e.g., Aberdeen & Rockfish R.R. Co. v. SCRAP*, 409 U.S. 1207, 1215 & n.6 (1972) (Because the suspension provisions of the Communications Act, Interstate Commerce Act, Federal Power Act, and Natural Gas Act are comparable, a decision construing one act would be applicable to each of the acts.); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (The basic federal ratemaking principles apply "across the spectrum of regulated utilities."); *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981) (Because the ratemaking provisions of the Communications Act, the Interstate Commerce Act, and the Natural Gas Act are, "in large part, identical . . . the principles of judicial review of agency refund decisions in ratemaking cases are of general applicability."); *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 877 n.21 (2d Cir. 1973) (The ratemaking provisions of the Communications Act and the Natural Gas Act are substantially the same.).

rates. The first method is for the carrier, pursuant to Section 203, to file new rates with the FCC.[34] If the Commission, acting under Section 204, does not reject or suspend the carrier's new rates within 90 days, they become effective from that point on.[35] The second method is for the FCC, acting under Section 205, to initiate an investigation of the carrier's existing rates. If the Commission concludes, after opportunity for hearing, that those rates are not just and reasonable, it may prescribe new rates "to be *thereafter* observed." [36]

There is only one situation in which the Act authorizes the FCC to order a carrier to make a general refund of revenues collected pursuant to its effective rates.[37] Section 204 provides that, at the time the carrier files a new tariff, the Commission may suspend the carrier's proposed rates for five months, during which it can conduct an investigation of the specific aspects of the rates that it believes may be improper.[38] At the end of the suspen-

[34] *See* 47 U.S.C. § 203 (1982).

[35] 47 U.S.C. §§ 203(b)(1), 204(a) (1982).

[36] 47 U.S.C. § 205 (1982) (emphasis added).

[37] *See* 47 U.S.C. § 204(a) (1982). Section 208 of the Act establishes a complaint procedure for challenging rates that the Commission has allowed to go into effect that the complainant believes are not just and reasonable. 47 U.S.C. § 208 (1982). In such proceedings, the complainant must bear the burden of proof and relief is limited "to actual damages rather than to the [amount] that would have been available had the FCC ordered an investigation [under Section 204]." *Aeronautical Radio, Inc. v. FCC,* 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 976 (1981).

[38] Congress has made clear that it intends for the FCC to conduct its review of the lawfulness of a carrier's rates at the time they are filed. In 1976, Congress extended the suspension period in the Communications Act from 3 to 5 months in order to "enable [the FCC] to keep pace with its regulatory responsibilities." The House Interstate and Foreign Commerce Committee specifically stated that it "expects that the Commission will continue to handle the majority of its less complicated tariff filings within the 3-month time frame . . . [and] will be able to complete major tariff filings

sion period, if the investigation is not complete, the Commission must allow the proposed rates to go into effect, but may make any *increased* rates (or rates for *new* services) subject to an accounting order.[39] This order preserves the Commission's right to require a carrier to refund the revenues collected pursuant to any component of the increased rates that the Commission ultimately finds, after hearing, was not just and reasonable when filed.

In the present case, the FCC did not comply with the refund procedures specified in Section 204. It did not suspend COMSAT's revised rates; it issued an accounting order only after the rates had gone into effect; it did not find that any component of COMSAT's rates had not been just and reasonable when filed; and it required COMSAT to refund revenues received pursuant to tariff filings that *reduced* its effective rates. The FCC asserts that these facts are "irrelevant"[40] because the general grant of authority in Section 4(i)[41] permits it to order

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within the 5-month time frame." H.R. Rep. No. 1315, 94th Cong., 2d Sess. 5 (1976).

[39] 47 U.S.C. § 204(a) (1982). As originally enacted, the Communications Act "authorize[d] the Commission to impose accounting and refund orders only in cases of tariffs involving increased charges." H.R. Rep. No. 1315, 94th Cong., 2d Sess. 5 (1976). In 1976, Congress amended the Act to permit the FCC also to "issue accounting and refund orders in connection with tariffs involving charges for a new service." *Id.* at 5-6; *cf. Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 657 (1978) (In enacting Section 15(7) of the Interstate Commerce Act—which provided the model for Section 204—Congress concluded that "there is no need to create a refund procedure to protect" a carrier's customers from decreased rates.); *Federal Power Comm'n v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968) (Under Section 4(e) of the Federal Power Act—which parallels Section 204—the agency's refund power is limited to rate increases; it cannot order a carrier that has filed a rate increase to refund revenues in excess of the amount of the increase.).

[40] FCC Reply to COMSAT Opposition to Summary Affirmance at 9 n.16. (Oct. 11, 1989).

[41] 47 U.S.C. § 154(i) (1982).

refunds to enforce the 1978 rate of return prescription—"whether or not the procedures set forth in Section 204 are met." [42]

The Communications Act, like the other federal ratemaking statutes, neither authorizes the agency to issue a "rate of return prescription" nor to "enforce" it by ordering refunds. To be sure, the determination of a carrier's appropriate rate of return—that is, the amount of revenues (expressed as a percentage) that the carrier has an opportunity to earn on its capital assets devoted to the provision of service [43]—is one component in the determination of a carrier's lawful rates.[44] Until the early 1970's, that is how the FCC used rate of return in fulfilling its statutory responsibilities. In 1971, faced with an unusually complex AT&T rate investigation, the Commission decided to bifurcate its ratemaking investiga-

[42] FCC Reply to COMSAT Opposition to Summary Affirmance at 9. We note that the Commission has recognized that "the question of [its] legal authority" to order refunds of decreased rates "is a highly controverted one." *Annual 1988 Access Tariff Filings*, 4 FCC Rcd 3965, 3966 (1989), *petition for review docketed sub nom. Southern Bell Tel. Co. v. FCC*, No. 89-1081 (D.C. Cir. Feb. 2, 1989), *motion to hold in abeyance granted* (D.C. Cir. Aug. 4, 1989). Seeking "to avoid possibly protracted litigation" on this issue, the Commission has recently declined to order refunds in such circumstances. *Id.*; *see also Annual 1988 Access Tariff Filings (GTE Operating Cos.)*, CC Docket 88-1, Phase II, Order, FCC 90-82, at ¶ 5 (released Mar. 28, 1990).

[43] A carrier's authorized rate of return is generally equivalent to the carrier's cost of capital or the amount that it needs "to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

[44] In determining lawful rates, the agency multiplies the carrier's authorized rate of return by the amount of "used and useful" or "prudently invested" capital devoted to the provision of the carrier's services (rate base). The product, reflecting the allowed return (expressed in dollars), is then added to expenses, including taxes, to arrive at the carrier's revenue requirements. Revenue requirements divided by anticipated demand yields the rates that the carrier may charge.

tion. In Phase I, the FCC "prescribed" a rate of return for AT&T, ordering it to use that rate of return in designing interim rates pending the Commission's determination of the other components of AT&T's rates in Phase II of the proceeding. This approach was challenged in the D.C. Circuit. In *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975), the court recognized that Section 205 of the Communications Act, which authorizes the Commission to prescribe rates, does not authorize the prescription of rates of return. Nevertheless, the court held that Section 4(i) authorizes the Commission to prescribe a rate of return as a target which the carrier's rates must be "reasonably designed" to meet.[45]

At the time, neither the FCC nor the *Nader* court suggested that the authority to "prescribe" a rate of return in the context of the AT&T proceeding could form the basis for the Commission to impose a radically different system of ratemaking. That, however, is precisely what the Commission has done. Relying on *Nader*, the Commission has prescribed carriers' rates of return as a routine procedure, and it has interpreted its "rate of return prescriptions" in a manner inconsistent with the prospective ratemaking system enacted by Congress.

Thus, in 1984, in another proceeding regarding AT&T, the FCC asserted (for the first time) that a rate of return prescription was not a benchmark to be used in designing a carrier's rates, but rather a ceiling on the carrier's maximum permissible earnings; that this limit on earnings remained in effect unless and until the FCC prescribed a new rate of return; and that a carrier violated the Communications Act if its rates, although designed by the carrier to achieve the targeted rate of return and allowed to go into effect by the FCC, generated

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[45] *Nader*, 520 F.2d at 202-03. This use of Section 4(i) is not inconsistent with the prospective ratemaking scheme mandated by Congress. *See id.* at 202 (The FCC's rate of return prescription was "intended to have a prospective effect.").

a return in excess of the level prescribed.[46] The Commission further asserted that Section 4(i) gives it "broad authority" to order a refund—even though it had not employed the refund procedures specified in Section 204—as a remedy for this alleged violation.[47] The resulting refund order was upheld by a divided panel in *New England*.[48] The Commission subsequently adopted a rule imposing its rate of return/refund scheme on all dominant domestic communications common carriers subject to its rate regulation.[49] While the D.C. Circuit struck down that rule,[50] the FCC has persisted in its efforts to apply this regime to the carriers that it regulates.[51]

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[46] *AT&T Earnings on Interstate & Foreign Services During 1978*, 102 F.C.C.2d 52, 63-65 (1984).

[47] *Id.* at 65.

[48] *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987). The panel consisted of Judges Mikva and Buckley and Senior District Judge Parsons. Judge Buckley dissented, observing that "[f]or more than fifty years the Communications Act has been understood to establish a precise, express statutory scheme governing refunds and the setting of rates. Never before has Section 4(i) been held to authorize refunds." *Id.* at 1112 (Buckley, J., dissenting).

[49] *Authorized Rates of Return for the Interstate Services of AT&T Communications & Exchange Telephone Carriers*, 51 Fed. Reg. 11,033 (1986).

[50] *AT&T*, 836 F.2d 1386 (D.C. Cir. 1988).

[51] Since issuing the COMSAT refund order, the Commission has issued a series of refund orders which have continued to chip away at the statutory structure created by Congress. *See, e.g.*, *Annual 1985 Access Tariff Filings*, 4 FCC Rcd 3959 (1989), *petition for review docketed sub nom. BellSouth Corp. v. FCC*, No. 89-1380 (D.C. Cir. June 13, 1989); *Annual 1988 Access Tariff Filings*, 4 FCC Rcd 4115, *recon. granted in part*, 4 FCC Rcd 3965 (1989), *petition for review docketed sub nom. Southern Bell Tel. Co. v. FCC*, No. 89-1081 (D.C. Cir. Feb. 2, 1989), *motion to hold in abeyance granted* (D.C. Cir. Aug. 4, 1989). In seeking to justify these orders, the Commission has asserted that the detailed procedural safeguards contained in Section 204 are nothing more than "optional protective measures which this Commission may elect to impose, but which are not necessary in order for the Commission to order refunds to customers." *Annual 1985 Access Tariff Filings*, 4 FCC Rcd at 3962.

The end result of the series of actions outlined above is that the FCC (alone among the federal ratemaking agencies) has replaced the system of *prospective rate* regulation in the Communications Act (and in other regulatory statutes), with its own *retroactive rate of return* scheme.[52] By upholding the FCC's refund order, the court below has sanctioned an interpretation of the ratemaking provisions of the Communications Act that is inconsistent with the settled law with respect to the substantially similar ratemaking provisions of the other federal regulatory statutes. In particular, the decision below sanctioned a ratemaking scheme that is flatly inconsistent with the fundamental principles of prospective ratemaking articulated by this Court and the courts of appeals. *See infra* Part II. And by allowing the Commission to rely on Section 4(i) for refund authority denied it by the substantive ratemaking provisions of the Act, the decision below conflicts with the basic principle of statutory interpretation that specific statutory provisions take precedence over general ones. *See infra* Part III.

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[52] The difference between prescribing *rates* and prescribing *rates of return* is significant in and of itself, and in the context of the congressionally mandated system of prospective rate regulation. When the Commission prescribes *rates*, the carrier knows from the outset precisely how much it must charge. The carrier's obligations are far less clear under a rate of return scheme. If a prescribed rate of return is simply a benchmark to be used by the carrier in designing its rates (the procedure approved in *Nader*), the carrier would comply by filing rates reasonably designed to generate the prescribed return, which are the rates it would thereafter charge. If, however, a prescribed rate of return is a ceiling on the carrier's earnings (as the FCC contends in the present case), the carrier cannot know until after the fact how much it had earned and therefore whether or not it has been in compliance. The reason for the uncertainty is that, as the FCC has conceded, carriers are "unable to target their earnings with precision due to their dependence on demand forecasts which hinge on the state of the economy and other unpredictable factors." *Authorized Rates of Return for Interstate Services of AT&T & Exchange Telephone Carriers*, 50 Fed. Reg. 41,350, 41,351 (1985). As a result, "[a] carrier cannot be expected to receive earnings at precisely the prescribed rate of return." *AT&T*, 836 F.2d at 1390.

II.

Certiorari should be granted because the decision below interpreting the ratemaking provisions of the Communications Act conflicts with the basic principles of prospective rate regulation incorporated in the various federal regulatory statutes, and consistently applied by this Court and the courts of appeals.

Each of the several federal regulatory statutes enacted by Congress implements a simple but fundamental principle: ratemaking is to be prospective.[53] The seminal case is *Arizona Grocery Company v. Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370 (1932). In that case, the Interstate Commerce Commission had prescribed a carrier's rate. Although the carrier charged its customers the prescribed rate, the agency subsequently ordered the carrier to refund revenues on the ground that the rate the agency had prescribed was excessive. This Court struck down the refund order, explaining that, once the Commission had prescribed

> the maximum reasonable rate to be charged by a [regulated common] carrier, it may not at a later

[53] *See, e.g., Arkansas Louisiana Gas*, 453 U.S. at 578 (A federal regulatory agency "has no power to alter a rate retroactively."); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956) (A federal regulatory agency's power to set rates "is limited to prescribing the rate" to be thereafter observed "and thus can effect no change prior to the date of the order."); *Transcontinental & Western Air, Inc. v. CAB*, 336 U.S. 601, 605 (1949) ("[A] departure from the customary pattern of fixing rates prospectively . . . [would] make a radical break with tradition.").

This principle forms the basis for two cardinal federal ratemaking doctrines: the rule against retroactive ratemaking and the filed rate doctrine. Under the rule against retroactive ratemaking, once a regulatory agency has allowed the carrier's rates to become permanently effective, it "may not impose a retroactive rate alteration and, in particular, may not order reparations." *Arkansas Louisiana Gas*, 453 U.S. at 578 n.8. Under the filed rate doctrine, the carrier's effective rates, "whether fixed or merely accepted by the Commission," are the only rates to which customers have "a legal right." *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951).

> time . . . subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.

Id. at 390. Subsequent cases construing the Federal Power Act and the Natural Gas Act have made clear that the system of prospective ratemaking developed by Congress also prohibits a regulatory agency from ordering a carrier to refund revenues collected pursuant to its effective rates when, as here, the rates have been filed by the carrier and "merely accepted by the Commission." [54]

The FCC contends that its refund order in this case does not violate the rule against retroactive ratemaking because it is merely enforcing the "rate of return pre-

[54] *Montana-Dakota*, 341 U.S. at 251; *see Federal Power Comm'n v. Hope Gas Co.*, 320 U.S. at 618 (Once the agency allows a carrier's rates to go into effect, it "has no power to make reparation orders . . . [I]ts power to fix rates is . . . limited to those 'to be thereafter in effect and in force.'" (quoting 15 U.S.C. § 717d)); *Arkansas Louisiana Gas*, 453 U.S. at 578 n.8 (Once the agency has allowed a carrier's rates to become effective, it "may not impose a retroactive rate alteration and, in particular, may not order reparations."); *see also Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 808 (10th Cir. 1986) (A federal regulatory agency may order a refund "only where the company's rates have been suspended" pending an investigation.), *cert. denied*, 479 U.S. 1043 (1987); *Massachusetts v. United States*, 729 F.2d 886, 887 (1st Cir. 1984) (Once a regulated entity's rates have become effective, it "has no obligation to give customer refunds, even if the rates are found unreasonably high."); *Natural Gas Pipeline Co. v. FERC*, 590 F.2d 664, 668 (7th Cir. 1979) (FERC's enabling statute "prohibits the Commission from retroactively applying a 'new rate' to a prior point in time, and requires the 'new rate' to be enforced prospectively only.").

In contrast to its interpretation of the Communications Act, the D.C. Circuit has held that once FERC has allowed a carrier's rates to become effective, its "remedial power . . . is limited to prospective relief: the Commission cannot order a refund of past payments made under [a rate subsequently found to be excessive]." *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 184 (D.C. Cir. 1986); *see also Public Utils. Comm'n v. FERC*, 894 F.2d 1372, 1383-84 (D.C. Cir. 1990); *American Public Gas Ass'n v. Federal Power Comm'n*, 567 F.2d 1016, 1057 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

scription" that it adopted in 1978.[55] As noted above, Section 205 of the Act authorizes the Commission to prescribe "rates," not "rates of return." [56] If, however, the Commission chooses to proceed under the prescription section, it is bound by the remedies provided for in that section.[57] In *Atlantic Refining Company v. Public Service Commission*, 360 U.S. 378 (1959), the Court compared the remedies provided by Sections 4 and 5 of the Natural Gas Act (which parallel Sections 204 and 205 of the Communications Act). The Court specifically noted that if, at the time the carrier files new or revised rates, the Federal Power Commission (now FERC) employs the suspension and accounting procedures of Section 4, it may issue an order permitting "the consumer [to] recover refunds for monies paid under excessive increases" between the date the carrier's rates go into effect and the date the agency concludes its investigation. *Id.* at 389. However, if the agency allows the carrier's rates to go into effect without employing the Section 4 procedures, the statute does not permit the agency to order refunds. In this situation, the Court observed, Section 5 permits the agency to conduct an investigation and, if it concludes that the carrier's rates are not just and reasonable, to prescribe new rates "which become[] effective prospectively only." *Id.* The Court made clear that ratepayers "have no protection from excessive charges collected" prior to the time new rates are prescribed; they are

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[55] COMSAT's argument that the 1978 prescription was no longer in effect during the period covered by the refund order is discussed *infra* at Part IV.

[56] *See supra* at 13-16.

[57] *See AT&T*, 836 F.2d at 1393 (Starr, J., concurring) ("Each statutory section [of the Communications Act] containing a specific mandate . . . contains a corresponding penalty for violation. . . . If, say, a section 205(a) prescription is violated, the Commission may invoke the remedial mechanism crafted specifically to deal with such violations (found in section 205(b)).").

"*without the protection of* [*a*] *refund, as is possible in a § 4 proceeding.*" *Id.* at 389-90 (emphasis added).[58]

The application of these principles to the present case is clear. When COMSAT filed the rates at issue, the Commission could have suspended the rates or imposed a timely accounting order if it wished to preserve its right to order refunds in the event that it subsequently found that some component of the increased rates was not just and reasonable when filed. It not only failed properly to invoke these statutory remedies, but specifically found that the rates filed by COMSAT had been revised to achieve the rate of return the Commission had specified. As Judge Starr observed in a previous refund case, for the Commission to order a refund in these circumstances

> does clear violence to the values of stability and predictability that Congress so carefully enshrined in the Communications Act. . . . Carriers are no longer able to rely on filed rates; instead they must go about their business in constant jeopardy of being forced to refund enormous amounts of money, even though they complied scrupulously with their filed rates.[59]

As the Court noted in *Atlantic Refining Company*, the structure created by Congress does not authorize refunds

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[58] *See also Indiana & Michigan Elec. Co. v. Federal Power Comm'n*, 502 F.2d 336, 344-45 (D.C. Cir. 1974) ("The FPC's power to order refunds . . . is directly tied to the exercise of [its] suspension power."), *cert. denied*, 420 U.S. 946 (1975).

[59] *AT&T*, 836 F.2d at 1394 (Starr, J., concurring). On April 16, 1990, the Court heard oral argument in *Maislin Industries v. Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989), *cert. granted*, 110 S. Ct. 834 (1990) (Docket No. 89-624, Oct. 16, 1989). In *Maislin*, the Eighth Circuit held that the trustee in bankruptcy for a carrier that had filed a rate with the Interstate Commerce Commission, subsequently negotiated a lower rate with a customer, and collected the negotiated rate, was not entitled to recover the filed rate in a subsequent action. There are significant statutory and factual differences between *Maislin* and the present case. However, both cases present questions as to the specific circumstances under which there can be exceptions to the filed rate doctrine.

for all rates that the agency may ultimately conclude are excessive.[60] That was Congress' choice.[61] In enacting the Communications Act, as with all of the ratemaking statutes, Congress sought to balance the interests of carriers and their customers.[62] Under the prospective ratemaking system adopted, if a carrier sets rates that result in its earning less than a fair rate of return, it cannot recover the resulting underearnings; it can file higher rates for the future, but "must bear the loss" from the past. *Board of Public Util. Comm'rs v. New York Tel.*

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[60] *Atlantic Refining Co.*, 360 U.S. at 389; *see also Montana-Dakota*, 341 U.S. at 254 ("It is urged that this leaves [a customer who makes payment pursuant to a carrier's effective rate] without a remedy. . . . We agree.").

[61] Indeed, less than a year before it enacted the Communications Act, Congress specifically repudiated the sort of retroactive adjustment procedure that the Commission imposed here. In 1920, Congress amended the Interstate Commerce Act to set a 6% rate of return for railroads, and required carriers to give up any revenue in excess of 6%. *See* Transportation Act of 1920, 41 Stat. 456, 488-91 (1920). Congress repealed this provision in 1933. The House Committee Report noted "'the impossibility of [a carrier] maintaining the level of rates required to produce the percentage rate fixed by the statute,'" H.R. Rep. No. 193, 73d Cong., 1st Sess. 29 (1933) (quoting H.R. Rep. No. 456, 66th Cong., 1st Sess. (1919)), and concluded that "'the difficulties, disadvantages, and dangers of recapture far outweigh its possible advantages.'" *Id.* at 30 (quoting testimony of the Chairman of the Legislative Committee of the Interstate Commerce Commission).

[62] *See United States v. SCRAP*, 412 U.S. 669, 697 (1973) (In enacting the ratemaking provisions of the Interstate Commerce Act, Congress struck a "careful balance of interests."); *United Gas Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958) (In drafting the Natural Gas Act, "Congress . . . was not only expressing its conviction that the public interest requires protection of consumers from excessive prices . . . but was also manifesting its concern for the legitimate interests of [the carriers] in whose financial stability the . . . public has a vital stake."); *Federal Power Comm'n v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949) (In enacting the Power Act, Congress "had both producers and customers in mind. Legislative adjustments were made to reconcile the conflicting views.").

Co., 271 U.S. 23, 31-32 (1926). By the same token, however, if the carrier initially sets rates that turn out to yield revenues in excess of a fair rate of return, it is not required "to give up . . . any part of its accumulations from past operations." *Id.* at 32.[63] In that case, it is up to the agency to prescribe new rates to be observed in the future or, under a rate of return regime, to direct the carrier to file new rates reasonably calculated to achieve the appropriate level of return.

The present case reflects the FCC's dissatisfaction with this statutory balance. The Commission, however, does not have the authority to change it. Congress struck the balance between carriers and their customers; only Congress can alter it. In sixty years, the Congress has shown no inclination to do so.[64]

III.

The FCC seeks to displace the specific system of prospective ratemaking enacted by Congress through the use of the agency's general authority under Section 4(i) to take any action "not inconsistent" with the Communica-

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[63] *See also Washington Gas Light Co. v. Baker*, 188 F.2d 11, 21 (D.C. Cir. 1950) ("[T]he legality of past rates may not be challenged . . . past excessive earnings belong to the [carrier] just as past losses must be borne by it."), *cert. denied*, 340 U.S. 952 (1951).

[64] While Congress has not altered the pertinent provisions of the Communications Act, it recently modified Section 206 of the Federal Power Act (which is comparable to Section 205 of the Communications Act). The amended provision permits FERC, when it prescribes a carrier's future rates, to order the carrier to refund revenues that it collected pursuant to its existing rates during a 15-month period beginning sixty days after the initiation of the agency's investigation. *See* 16 U.S.C. § 824e (1988). In amending Section 206, Congress was aware that it was departing from the prospective ratemaking procedures set forth in the other regulatory statutes, and that legislation was required to make this change. *See, e.g.*, H.R. Rep. No. 384, 100th Cong., 1st Sess. 2-3 (1987) ("[R]elief pursuant to a Section 206 determination is prospective only. . . . [The proposed amendment] would change the procedure."). Congress has made no similar change in the Communications Act.

tions Act that is "necessary in the execution of its functions." [65] The FCC's efforts to use this general authority conflict with the fundamental canon of statutory interpretation that general provisions of a statute cannot take precedence over specific ones.

This Court has recognized that the Commission's general authority under Section 4(i) is broad. Where Congress has not prescribed the applicable procedure, the Commission has the power under Section 4(i) to adopt its own regulations, and to fashion remedies "imperative for the achievement" of its statutory obligations.[66] This is not such a case. The decision of the court below permits the Commission to use the general grant of authority under Section 4(i) not to *fill* a statutory void, but to *displace* the specific system of prospective ratemaking mandated by the Act.

This Court has repeatedly held that, "[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the statute.'" [67] For example, in *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204 (1932), a district judge, purporting to act under the general grant of authority contained in Section 2(15) of the Bankruptcy Code, issued an order to arrest a bankrupt. In so doing, the court had not employed the proce-

[65] 47 U.S.C. § 154(i) (1982).

[66] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-81 (1968) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968)); *see United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956) (Section 4(i) permits the FCC to impose additional licensing requirements in situations "not specifically" addressed by the Communications Act); *cf. FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (Section 4(i) "delegat[es] to the Commission power to resolve *subordinate* questions of procedure." (emphasis added)).

[67] *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)); *see also Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) ("Specific terms prevail over the general.").

dures (including detailed procedural safeguards) contained in another section of the Code that specifically related to arrests. This Court struck down the arrest order, reasoning that even though the language of Section 2(15) "was broad enough" to include the issuance of an order to arrest a bankrupt, the lower court was required to employ the procedures set out in the provision of the Code that "specifically govern[ed]" the situation. "[S]pecific terms," the Court made clear, "prevail over the general [provisions] . . . which otherwise might be controlling." *Id.* at 207-08.

This basic principle of statutory interpretation is fully applicable to the question of whether a federal regulatory agency can use its general authority to displace specific ratemaking provisions in its governing statute. Thus, in *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380 (1974), the Court invalidated a Federal Power Commission order that sought to use the agency's general grant of authority to exempt small producers from certain ratemaking requirements contained in the Natural Gas Act. The Court explained that, while the general grant of authority gave the agency "great discretion in carrying out its statutory responsibilities[, it] . . . does not authorize the Commission to set at naught an explicit provision of the Act." *Id.* at 394.[68]

The courts of appeals have consistently applied this principle. The case most closely on point is *American Telephone & Telegraph Company v. FCC*, 487 F.2d 865 (2d Cir. 1973). In that case, the FCC sought to use Section 4(i) to displace the procedures specified in Section 203 of the Communications Act—which permits carriers to file new rates at will—with a new procedure under

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[68] *See MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1194 (D.C. Cir. 1985) ("However reasonable the Commission's assessment, we are not at liberty to release the agency from the tie that binds it to the text Congress enacted."); *cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986) ("To permit an agency to expand its power in the face of a congressional limit on it would be to grant the agency the power to override Congress.").

which AT&T would have had to seek advance permission before filing tariffs for certain services. The Second Circuit struck down the order. "In enacting Section 203 of the Communications Act," the court stated, "Congress intended a specific scheme. . . . A balance was achieved after careful compromise. The Commission is not free to circumvent or ignore that balance." *Id.* at 880. Rather, the court held, the FCC must adhere to "the statutory plan of carrier initiated rate changes, a limited suspension period, rate refunds and rate prescriptions only after a full hearing and specific findings." *Id.* at 875.[69]

The same principle of statutory construction was expressed by the D.C. Circuit in a recent FERC case. In *Public Service Commission v. FERC*, 866 F.2d 487 (D.C. Cir. 1989), the agency sought to use the general grant of authority in Section 16 of the Federal Power Act (which is comparable to Section 4(i) of the Communications Act) to substantially change its ratemaking procedures to protect ratepayers from excessive rates *before* the agency prescribed new rates. The D.C. Circuit struck down the proposed procedure, firmly rejecting the notion that Section 16 "might possess some exceptional power to trump" the ratemaking procedures provided by Congress. *Id.* at 490-91. An agency, the court emphasized, must "adhere to the basic framework of the Act, despite resulting inconvenience." *Id.* at 492.

The Eighth Circuit adopted a similar approach to statutory interpretation in *Cooperative Power Association v. FERC*, 733 F.2d 577 (8th Cir. 1984). In that case, the court concluded that FERC could not use "the general power" provided by Section 313(a) of the Federal Power Act to order a refund when the agency had not complied with the specific refund provisions contained in the statute (which are comparable to Section 204 of the Communications Act). The court observed

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[69] *See also North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) ("Section 4(i) is not infinitely elastic.").

that "[c]learly by its enactment of [the specific ratemaking provisions in the Federal Power Act] Congress anticipated cases in which rates would be found unreasonable, and subject to future adjustment, but would not be subject to refund . . . ." *Id.* at 580. The general grant of authority could not be used to "effectively amend . . . the Act." *Id.*

In the present case, Sections 203 through 205 of the Communications Act set forth specific provisions governing ratemaking and contain detailed procedures (including important procedural safeguards) concerning refunds. The FCC declined to follow the path set forth by Congress, seeking instead to invoke the agency's general powers as justification for designing and implementing an entirely different regime—a regime in which the Commission prescribed a rate of return, and sought to enforce it by ordering refunds rather than by prescribing new rates to be thereafter observed. The decision below, which allows such a scheme on the basis of Section 4(i) of the Act, cannot be reconciled with the principles of statutory construction articulated by this Court and the courts of appeals.

IV.

Even if the Commission had the authority to prescribe a carrier's rate of return, and to enforce that prescription by ordering the carrier to refund revenues in excess of the prescribed limit on return, this case would merit grant of *certiorari* because the court below departed from the accepted and usual course of judicial procedure by summarily affirming the Commission's refund order without addressing a fundamental argument raised by Petitioner.[70]

As detailed above, the Commission required COMSAT to refund revenues collected between August 1984 and December 1986 in order to "enforce" the Commission's

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[70] *Compare Taylor v. McKeithen,* 407 U.S. 191 (1972) (*per curiam*) (Summary disposition vacated where the court of appeals failed to address an "important" question.).

1978 rate of return prescription. COMSAT sought to argue before both the Commission and the D.C. Circuit that the 1978 rate of return prescription ceased to be effective in 1979, when the Commission knowingly permitted COMSAT rates targeted to generate a rate of return in excess of 12.48% to go into effect. The D.C. Circuit—like the FCC—refused to consider this argument on the ground that all issues had been disposed of by the court's earlier decision in *New England.*

This holding is plainly erroneous. In *New England*, the court was not asked to consider, and expressed no opinion on, the question of whether the Commission's acceptance of rates designed to generate a rate of return in excess of the prescribed amount served to terminate its previous rate of return prescription. Indeed, to the extent that the D.C. Circuit has addressed the question of how long a rate of return prescription remains operative, its pronouncements support Petitioner's view that the 1978 prescription was not in effect during the period covered by the refund order. The *Nader* decision, which permitted the FCC to prescribe a carrier's rate of return, specifically stated that a rate of return prescription "cannot remain binding indefinitely without agency reevaluation, especially during periods of rapidly changing economic conditions." [71] And in *New England*, the very decision which the panel below treated as dispositive, the D.C. Circuit noted that if a carrier "believed that [its] outstanding rate-of-return prescription was inadequate" it could "fil[e] rate increases." [72] This is precisely the course that COMSAT followe: in 1979 it filed new rates designed to generate a higher rate of return, which the FCC allowed to go into effect. The D.C. Circuit thus had no basis for granting summary affirmance without considering Petitioner's claim that the 1978 prescription was not in effect during the period covered by the refund order at issue here.

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[71] *Nader*, 520 F.2d at 205.

[72] *New England*, 826 F.2d at 1110.

We note, finally, that if the decision below were read as endorsing the Commission's contention that, once it has prescribed a rate of return, the prescription remains binding until the carrier seeks and the Commission formally grants a new rate of return prescription,[73] that decision would be at odds with a pronouncement of this Court and with a decision of the Second Circuit. This Court has stated that the generic federal ratemaking structure reflects Congress' awareness that

> [b]usiness reality demands that [carriers] should not be precluded by law from increasing the prices of their products whenever that is the economically necessary means of keeping the intake and outgo of their revenue in the proper balance; otherwise, procurement of the vast sums necessary for the maintenance and expansion of their systems would become most difficult, if not impossible.

United Gas Co. v. Memphis Light, Gas & Water Div., 358 U.S. at 113. The Second Circuit has expressly applied this principle to the Communications Act, striking down an FCC requirement that AT&T receive Commission approval before filing certain tariffs. *American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865 (2d Cir. 1973). The Commission's contention that a rate of return prescription remains binding until modified or vacated would permit it effectively to prevent a carrier from filing rate increases without prior approval—the very result that the Second Circuit rejected in *American Telephone & Telegraph.*

The issue as to whether the 1978 prescription order was in effect during the period covered by the challenged refund order warrants consideration by the Court.

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[73] *See* FCC Motion for Summary Affirmance at 8-9.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

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April 30, 1990

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1243

COMMUNICATIONS SATELLITE CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

Before: Wald, Chief Judge; Edwards and Silberman, Circuit Judges

ORDER

[Filed Nov. 17, 1989]

Upon consideration of respondent Federal Communications Commission's motion for summary affirmance and the responses thereto, it is

ORDERED that the order of the Federal Communications Commission in file number FCC 87-388, released January 28, 1988, be summarily affirmed substantially for the reasons stated therein. The issues presented in the petition for review are controlled by this court's decision in *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989), which is binding precedent in this circuit until rejected by the court *en banc* or overruled by the Supreme Court. *Spannaus v. U.S. Dept. of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987). The merits of

the parties' positions are therefore so clear as to justify summary action. *See Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1987) (per curiam), *cert. denied*, 449 U.S. 994 (1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CC Docket No. 80-634
and 85-268

IN THE MATTER OF

COMMUNICATIONS SATELLITE CORPORATION

Revisions to Tariff F.C.C. No. 101,
Implementing the Second Memorandum
Opinion and Order in CC Docket No. 80-634

COMMUNICATIONS SATELLITE CORPORATION

Revisions to Tariff F.C.C. No. 101,
Offering Bulk International Business
Satellite Service

COMMUNICATIONS SATELLITE CORPORATION

Revisions to Tariff F.C.C. No. 101, For
New Space Segment Full Period Video Leases

COMMUNICATIONS SATELLITE CORPORATION

Revisions to Tariff F.C.C. Nos. 101 and
14, Implementing Reconsideration Order
in CC Docket No. 80-634 and Report and
Order in CC Docket No. 82-540

COMMUNICATIONS SATELLITE CORPORATION

Tariff F.C.C. No. 103, Establishing Separate,
Unbundled Space Segment Offering

COMSAT INTERNATIONAL COMMUNICATIONS INC.

Tariff F.C.C. No. 1, Establishing Separate, Unbundled Multipurpose Earth Station Service Offerings in Compliance with Report and Order in CC Docket No. 82-540

COMSAT INTERNATIONAL COMMUNICATIONS INC.

Tariff F.C.C. No. 2, Establishing Separate Unbundled Special Purpose Earth Station Service Offiering through Santa Paula, California in Compliance with Report and Order in CC Docket No. 82-540

INTERNATIONAL BUSINESS EARTH STATIONS, INC.

Tariff F.C.C. No. 1, Establishing Offering of International Business Satellite Service at New York Teleport

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MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1987; Released: January 28, 1988

By the Commission:

I. INTRODUCTION

1. On April 6, 1987 the Common Carrier Bureau released its Memorandum Opinion and Order in the dockets captioned above.[1] That *April 6 Order* tentatively determined that Comsat must refund $61.7 million in revenues accrued which exceeded a 1978 rate of return prescription, in 1983-1986. The *April 6 Order* directed Com-

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[1] Communications Satellite Corporation. CC Docket Nos. 80-634 and 85-268. 2 FCC Rcd 3706 (1987) (*April 6 Order*).

sat to show cause why the excess revenues should not be refunded and required Comsat to propose a refund schedule and methodology for public comment, in the event excess revenues were ultimately refunded. The Order also resolved certain cost allocation issues that had been designated for investigation in these dockets.[2] Our decision in this Order is limited to the refund question.

2. Comsat has responded to the *April 6 Order* by asserting that its refund obligation is unfounded in law, and in any case is overstated. Comsat has also submitted a proposed refund methodology and schedule. Several parties have commented on Comsat's response and on its proposed refund methodology.[3] In addition, ITT and Fedex have filed petitions for reconsideration of the Bureau's *April 6 Order*.[4]

3. This Commission has reviewed the record developed in this docket and determined that it presents several unique factual circumstances, described in more detail below. We have taken into account these unique factual circumstances in exercising the equitable discretion inherent in agency consideration of refund matters. Consequently, we have determined that the public interest would be best served if Comsat's refund liability is limited to revenues accrued by Comsat during the period from August 1, 1984 to December 31, 1986 in excess of its

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[2] For a discussion of these cost allocation issues, see Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268. Mimeo No. 0672, released Nov. 8, 1985. (*Designation Order*); Erratum, Mimeo No. 1703, released Dec. 27, 1985.

[3] The pleadings received since the *April 6 Order* are described in Appendix A.

[4] Comsat responded to the petitions for reconsideration and application for review on June 26, 1987: replies were submitted July 10, 1987 by ITT, Fedex, the Networks and TBS. An application for review filed by Capital Cities/ABC, Inc., CBS, Inc., and National Broadcasting Company, Inc., initially supported by Turner Broadcasting System, Inc., has been withdrawn.

1978 Settlement Agreement prescription. This amount, totalling approximately $39 million, must be refunded as a lump sum pursuant to paragraph 45, *infra*, with interest calculated in accordance with Appendix C.

II. BACKGROUND [5]

A. *The 1978 Prescription*

4. This Commission first adopted an authorized rate of return for Comsat in 1975.[6] Our decision adopting that rate of return was stayed pending appeal and was subsequently susperseded in 1978 by a Settlement Agreement that established an authorized annual rate of return of 11.48 percent with a 1 percent allowance for efficiency.[7] At that time, Comsat had an all equity financial structure. The authorized rate of return was computed by imputing 45 percent debt at a 9 percent interest rate and establishing a hypothetical equity return of 13.2 percent, which reflected the addition of (1) a 4 percent risk premium to the then current yield (8.2 percent) for long-term U.S. government bonds, and (2) a 1 percent increment to reflect the increased risk that a 45 percent debt structure would produce. The resulting 11.31 percent return was adjusted to 11.48 percent to reflect "a synthesis of the gradual imputation of debt over six years . . ." 68 FCC 2d at 951. That 11.48 percent rate of return prescription with a one percent buffer has never been modified.

B. *Comsat Tariff Filings in Response to the Settlement Agreement*

5. The Settlement Agreement mandated a 48.5 percent reduction in Comsat's tariffed rates. On April 27, 1979,

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[5] The procedural history of these dockets is set forth in greater detail in the *April 6 Order* and the *Designation Order*. In this section, we summarize only those events relevant to the instant refund.

[6] Communications Satellite Corporation, 56 FCC 2d 1101 (1975).

[7] Communications Satellite Corporation, 68 FCC 2d 941 (1978).

Comsat filed tariff revisions further reducing its rates by 15 percent. No petitions were filed to reject, suspend or investigate the 15 percent rate reduction. The tariff revisions became effective on May 15, 1979 without investigation. The Chief of the Common Carrier Bureau subsequently requested information on Comsat's projected rate of return under the revised rates, by letter dated June 25, 1979. Comsat responded by letter on July 24, 1979, in which it projected an average return of 14.17 percent for the latter half of 1979 and alternative projections for 1980 of 9.8 percent and 12.6 percent, depending on the course taken by the notably volatile economy at that time. On December 28, 1979, Comsat filed further revisions reducing its rates by an additional 5 percent. These revisions were also uncontested and became effective without investigation on February 1, 1980. The Bureau again requested information on Comsat's projected rate of return. Comsat projected an average rate of return under the new rates of 17.88 percent in its February 29, 1980 letter to the Chief, Tariff Division (Att. C to Comsat's Response to Show Cause Order).

6. In the summer of 1980, Comsat developed alternative return projections ranging from 14.46 percent to 20.80 percent. Comsat discussed its rate development procedures informally with Bureau staff,[8] and filed tariff revisions on October 22, 1980 under Transmittal No. 384 which generally reduced its rates by 11.8 percent. In the transmittal letter accompanying its proposed revisions, Comsat explicitly noted that its projected rate of return for 1981 with the new rates was between 14.2 and 16.7 percent. No petitions were filed to investigate those charges and the charges became effective on December 24, 1980 without investigation.

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[8] Comsat Response to Show Cause Order at 25-26. There is no record of the content of those discussions. We note, however, that this Commission is not bound by informal discussions with our staff, nor can parties reasonably rely on them. *See, e.g.*, Southern New England Tel. Co., FCC 87-128, n.78, released Apr. 22, 1987.

C. *Second Structure and Earth Station Ownership Proceedings*

7. In 1980, this Commission initiated a Rule Making (*Comsat Structure Proceeding*) on Comsat's corporate structure, operations, and accounting practices.[9] On April 20, 1984 we released an order in that proceeding (the *Second Structure Order*),[10] in which we prescribed extensive revisions to Comsat's accounting practices. The revised accounting practices reduced certain jurisdictional accounts thereby decreasing the revenue requirement underlying Comsat's rates. 97 FCC 2d at 179. Accordingly, the Commission directed Comsat to file tariff revisions that would reflect the lower revenue requirement and would "be in compliance with its authorized rate of return (11.48%-12.48%)."[11] Comsat filed tariffs in purported compliance with the *Second Structure Order* which became effective on August 1, 1984.

8. In its petition for reconsideration of the *Second Structure Order*, Comsat challenged the requirement that its re-filed tariffs comply with the 11.48 percent rate of return requirement. Comsat contended that this Commission lacked authority to order such tariff revisions without a hearing under Section 205 of the Act. Comsat further argued that we were required to consider changes in the economy and the corporation since 1978 before requiring it to abide by the rate of return set in the Settlement Agreement. In our *Second Structure Recon-*

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[9] Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, 81 FCC 2d 287 (1980).

[10] Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, CC Docket No. 80-634, Second Memorandum Opinion and Order, 97 FCC 2d 145 (1984) (*Second Structure Order*); *recon.*, 99 FCC 2d 1040 (1984) (*Second Structure Reconsideration*).

[11] *Id.* at 179.

sideration Order,[12] we rejected Comsat's arguments, stating, *inter alia*:

> Comsat had every opportunity since the 1978 Settlement Agreement to petition us for relief if it believed its authorized rate of return was too low and did not reflect the changed circumstances to which it refers in its petition for reconsideration. For whatever reason, it did not do so. Until it does so and until relief is granted, Comsat shall submit tariffs reflecting cost-based rates that will earn the corporation its authorized rate of return. Comsat simply cannot unilaterally modify its authorized rate of return.

Second Structure Reconsideration, 99 FCC 2d at 1055-56.

9. In 1984, we released an order in our *Earth Station Ownership* proceeding.[13] In that proceeding, we concluded that Comsat should be required to provide its earth station services through a separate subsidiary and pursuant to cost-based rates unbundled from its space segment rates. Accordingly, Comsat filed tariffs which became effective in 1985 that provided separate rate schedules for its space and earth segment services.

D. *April 6 Order*

10. The Common Carrier Bureau reviewed Comsat's various tariff filings in response to the *Structure* and *Earth Station Ownership Orders* and concluded that it should investigate a number of issues raised by the fil-

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[12] 99 FCC 2d 1040 (1984).

[13] Modifications of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the Intelsat Global Communications Satellite System, CC Docket No. 82-540, 100 FCC 2d 250 (1984).

ings.[14] The *April 6 Order* resolved some of those issues while deferring the resolution of others pending further development of the record. The investigation also revealed that the rates under review had produced earnings in excess of Comsat's authorized level. Accordingly, the *April 6 Order* directed Comsat to refund the excess or show cause why it should not be required to do so.

III. DISCUSSION

A. *Refund Authority*

1. Pleadings

11. The Comsat response to the show cause order presents three alternative contentions. First, Comsat argues that this Commission does not have the power to order refunds for the violation of a rate of return prescription. Second, Comsat contends that the 1979 and 1980 decisions to accept tariffs that were expressly targeted to produce a greater return effectively vacated the 1978 rate of return prescription. Third, Comsat urges that, even if the prescription remained effective, it would be inequitable to apply that prescription to periods that precede the *Second Structure* decisions which "revive" the 1978 prescription.

12. Comsat's general arguments relating to this Commission's refund power are essentially the same as the arguments that AT&T and the Bell Operating Companies presented in another refund proceeding.[15] Those arguments were decisively rejected in a Court of Appeals opinion[16] issued shortly after Comsat filed its response

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[14] *See* note 2, *supra.*

[15] AT&T Earnings on Interstate and Foreign Services During 1978, 102 FCC 2d 52 (1984), *aff'd sub nom.* New England Tel. & Tel. Co. v. FCC, No. 85-1087 (D.C. Cir. August 21, 1987) (*New England Telephone*), *petition for rehearing pending.*

[16] *Id.*

in this proceeding. We have accordingly concluded that the pleadings on this subject do not warrant further discussion.

13. Comsat's second claim, that the 1978 rate of return prescription has lapsed, is based upon the series of events outlined in Section II.B., *supra*.[17] Comsat says that it filed a series of tariffs that were targeted to earn more than the prescribed return, that the Commission or the Common Carrier Bureau staff was informed orally and in writing that the rates were targeted to earn more than 11.48 percent, and that these "tariffs were permitted to go into effect without objection from the Bureau or anyone else . . . ."[18] Comsat also says that it submitted data to demonstrate the effect of double-digit inflation on the Comsat cost of capital and that this submission was discussed at a series of meetings with Common Carrier Bureau staff in the summer of 1980. Comsat describes this process as an application of the "continuing surveillance regulation" described in 1962 and 1971 statements of former Commission Chairmen. Comsat contends that the decision to accept the tariffs after consideration of Comsat's rate of return submissions "eliminated" the 1978 rate of return prescription. It also contends that a new proceeding would be required to establish a new rate of return prescription or to reinstate the old one.

14. Some of the replies dispute Comsat's claim that the 1978 prescription has been eliminated. For example, Univision says that the "argument that tariff revisions which were never the subject of an affirmative Commission order and which became effective through Commission silence and inaction, somehow superseded or nullified the rate of return prescribed in the 1978 Settlement Agreement . . . is contrary to law" and unfair to Com-

[17] Response at 24-33.

[18] Response at 24.

sat's customers.[19] Univision contends that the Commission's inaction, i.e., its acceptance of the tariff filings without investigation, has no bearing on the lawfullness of the rates.[20]

15. Fedex says the argument that accepting tariffs without investigation changed the prescription is "startling" and "[c]ontrary to a wealth of judicial and administrative precedent." [21] It contends that only prescribed rates are immune from refund liability,[22] that Bureau inaction on the tariffs Comsat filed is "without legal significance," [23] and that the 1980 discussions with Commission staff are irrelevant because "the Bureau had no authority to waive or modify the full Commission's 1978 Comsat rate of return prescription order." [24] Fedex also notes that this Commission has rejected claims that general fluctuations in the economy can affect an outstanding rate of return prescription in the absence of a petition to modify the prescription.[25] Finally, Fedex emphasizes that the Commission prescription was reaffirmed in 1984 "and Comsat has never sought appellate review of the 1984 reaffirmation nor petitioned the Commission to vacate the prescription order." [26]

16. In support of its third argument, that events make compliance with the prescription inequitable prior to mid-1984,[27] Comsat notes that this Commission first

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[19] Univision Reply at 10.

[20] Univision cites Las Cruces TV Cable v. FCC, 645 F.2d 1041 (D.C. Cir. 1981), as support for that contention.

[21] Fedex Reply at 16-17.

[22] *Id.* at 18.

[23] *Id.* at 20.

[24] *Id.* at 19.

[25] *Id.* at 16, *citing* AT&T Earnings, 78 FCC 2d at 666 n.7.

[26] *Id.* at 15.

[27] Response at 33.

directed Comsat to retarget rates to comply with the 1978 prescription in the April 1984 *Second Structure* Order and affirmed that view in the December 1984 *Second Structure Reconsideration.* Fedex says that the equities are against Comsat because Comsat intentionally and substantally exceeded the prescribed return.[28] Finally, Comsat contends that it would be improper to order refunds for earlier periods because the Common Carrier Bureau initiated this docket to investigate tariffs filed in 1984 and 1985 and did not specify any issues involving earlier tariffs for investigation.

2. Discussion

17. As noted in paragraph 12 above, Comsat's argument that this Commission lacks refund authority has been rejected by the Court of Appeals. In addition, we cannot accept Comsat's second argument that the rate of return prescription was eliminated in 1979 or 1980. We believe that such an argument is foreclosed by our decisions in the *Second Structure* proceeding. Those orders unequivocally concluded that the 1978 prescription is still in effect and will remain in effect until a proceeding is initiated and completed to vacate or modify that prescription. Comsat did not appeal those decisions and should not be permitted to reopen the question now.

18. Moreover, Comsat's argument would not be persuasive even if we decided to entertain a collateral attack upon the *Second Structure* orders. Comsat's analogy to the continuing surveillance process that was used to regulate AT&T in an earlier era does not fit this situation. We have always used formal procedures to establish or modify the AT&T authorized return since 1967.[29] More-

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[28] Fedex Reply at 22-23.

[29] *AT & T* (Docket Nos. 16258, 15011), 9 FCC 2d 30, 88, 114 (1967); *accord* Concurring Opinion of Comm'r Nicholas Johnson, *id.* at 123; *AT & T* (Phase I of Docket No. 19129), 38 FCC 2d 213

over, Commission prescriptions that have been embodied in a formal Commission order have been modified by a formal Commission order. The informal discussions in 1979-80 between Comsat personnel and Bureau staff did not result in any Commission or Bureau order that purported to vacate, modify or waive the rate of return prescription. Those informal processes also did not produce any document that purported to notify any Comsat customer that the rate of return prescription might be modified.

19. We have concluded, however, that there is some merit to Comsat's third contention. The course of events Comsat has described creates equitable considerations that warrant limiting refunds to the August 1984 through the December 1986 period. In the following paragraphs, we state the reasons for our conclusion. In view of that conclusion, we need not consider Comsat's claim that, because the Bureau did not designate earlier tariffs for investigation when it opened this docket, pre-1984 refunds are precluded.

20. In determining the refund appropriate to the instant case which best serves the public interest, we are mindful that we must exercise our refund authority with due regard for the factual circumstances of individual cases and the equitable considerations they create.[30] In *Las Cruces TV Cable v. FCC*,[31] the Court reviewed this Commission's first articulation of standards for ordering refunds. There, the Court noted that judicial review of

(1972); *AT & T* (Docket No. 20376), 57 FCC 2d 960 (1976); AT&T (Docket No. 79-63), 86 FCC 2d 221 (1981).

[30] *See* FPC v. Tennessee Gas Co., 371 U.S. 145, 155 (1962); Wisconsin Elec. Power Co. v. FERC, 602 F.2d 452, 457 (D.C. Cir. 1979).

[31] Las Cruces TV Cable v. FCC, 645 F.2d 1041, *loc. cit.* (D.C. Cir. 1981) (*Las Cruces*) (citing, *e.g.*, Public Service Comm'n v. FPC, 329 F.2d 242, 250 (D.C. Cir.), *cert. denied*, 377 U.S. 963 (1964)).

agency refund decisions has been marked by "great deference . . . perhaps based upon the discretionary nature of their refund power, but [courts] have nevertheless looked closely to see if the agency had considered relevant factors and if it had struck a reasonable accommodation among them." [32] In *Wisconsin Electric Power v. FERC*,[33] the Court held that the standard of review for an agency refund order is whether the order is "equitable in the circumstances of [the specific] litigation."

21. *Earnings before August 1, 1984* [34]—Applying these standards to the instant case, we have decided to order Comsat to refund only those excess revenues accrued after August 1, 1984, the effective date of the tariffs filed in compliance with the *Second Structure Order*. The events underlying Comsat's rate of return prescription as well as our regulatory treatment of the carrier in the years immediately following the Settlement Agreement present several unique factual circumstances which persuade us that this exercise of our discretion best serves the public interest.

22. As previously noted, Comsat filed a series of tariff revisions in which it explicitly targeted its proposed rates to earn above the prescribed rate of return. Those rates became effective without Commission action. In response to the earlier of these filings, the Bureau requested information about the return anticipated by Comsat, but took no formal action. The subsequent revisions were

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[32] *Id.* at 1047.

[33] 602 F.2d 452 (D.C. Cir. 1979).

[34] In the interest of simplicity, excess revenues and interest have been calculated from August 1, 1984 rather than July 30, 1984, when Comsat's tariffs in purported compliance with the *Second Structure Order* became effective. The Common Carrier Bureau is delegated authority to make any adjustment in the refund amount that may be necessary to reflect the actual effective date of the tariffs. *See* n.46, *infra*.

explicitly targeted well above Comsat's authorized rate of return, but still became effective without challenge by affected customers or the Bureau. Indeed, until the time of the *Second Structure Order*, the Commission took no action with respect to Comsat's tariffs solely on the basis of its improper targeting of a rate of return. Moreover, our inaction followed discussions between the Bureau and Comsat and letter submissions by Comsat which explicitly stated that Comsat had targeted its rate of return to exceed its prescribed level. We have concluded that our inaction on Comsat's proposed rates, in the face of our specific knowledge that Comsat's targeted rates exceeded the prescribed level, led Comsat to assume that we were no longer enforcing the rate of return prescribed in the Settlement Agreement, and that no further action on its part was required to obtain a change in the rate.

23. Our inaction would not have provided Comsat with a defense in a Section 208 complaint proceeding if Comsat's customers had chosen to pursue that remedy in a timely manner. Nor does it provide Comsat with a legal defense in the context of the present investigation. Nevertheless, it is a relevant consideration in determining whether we should exercise our discretionary refund powers to provide relief which those customers can no longer obtain in a Section 208 proceeding.[35] The customers' failure to file petitions or complaints pursuant to Section 208 is also a relevant factor. Comsat provides most of its services to other carriers who knew, or should have known, that Comsat's rate, although substantially reduced, were nevertheless targeted to exceed the prescribed return.

24. We have taken into account an additional equitable factor in determining the refund appropriate to these circumstances, namely, the likelihood that Comsat could

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[35] The Communications Act establishes a two year statute of limitations for reparations claims. 47 U.S.C. § 415.

have made a persuasive showing that it was entitled to a change in its authorized rate of return level. Based on the actual economic conditions during the 1980-84 time period, we believe it is likely that Comsat would have succeeded in obtaining such a change. Financial and business conditions have not been stable over the ten years since the Settlement Agreement. Arguably, economic circumstances had made the 11.48 percent six-year average outdated by the end of the first year it was in effect. Interest and inflation rates during 1980-84, including those to which the Settlement Agreement's prescription was pegged, soared to unprecedented heights. The Treasury bond rate at the time of the Settlement Agreement was 8.2 percent, but by 1980 it had risen to 10.8 percent and by 1982 had risen to 12.2. In 1983, the rate had dropped only to the 1980 level. The A-rated corporate bond rate rose from 9 to 12.9 percent in 1980, reaching 15.4 percent in 1982 and dropping only to 13.1 in 1983. Treasury and corporate rates only returned to 1978 levels in 1986. Indeed, a review of these economic indicators demonstrates that Comsat's revenues do not substantially exceed those that probably would have been authorized, had periodic adjustments to the 1978 return prescription been made under the Settlement Agreement's methodology to reflect prevailing economic conditions. The formula used in the Settlement Agreement to derive the prescribed level would have produced higher rates of return if actual prevailing interest rates during the relevant time periods are substituted for the projections in the Settlement Agreement Order. For example, as described in Appendix B, annually adjusting the Settlement Agreement's assumptions to reflect prevailing rates for taxable Treasury bonds and A-rated corporate bonds would have resulted in an average return for the 1978-1983 period of 14.11-15.11 percent.

25. If Comsat had filed a rate of return represcription petition in 1979 or 1980, we might, of course, have adopted a different methodology to determine a new au-

thorized rate. Nevertheless, it seems likely that any methodology could have produced a higher rate of return if the decision was made during a period that was marked by high inflation and very high interest rates. We note, for example, that the AT&T authorized return was represcribed in 1981 to replace the 1976 9.5 percent prescription with a 12.75 percent prescription. In light of these changes in economic conditions after the adoption of the Settlement Agreement, we have concluded that our equitable adjustment to Comsat's refund liability is fair to ratepayers and consistent with the public interest since it is unlikely that Comsat's rates during the pre-August 1, 1984 period were unjustly or unreasonably high.

26. We emphasize here that all aspects of these unique factual circumstances are crucial to our allowing Comsat to retain the revenues accrued prior to the *Second Structure Order*. Absent our knowing acceptance of, and failure to investigate, explicitly "excessive" rates (uncontested by ratepayers), or the surrounding anomalous economic conditions, the equitable considerations would be fundamentally different.[36]

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[36] We do not, for example, foresee any circumstances that would warrant suspending enforcement of the present Part 65 refund procedures or that would enable carriers that are subject to those rules to present a credible claim that they did not expect full enforcement. In addition, the equitable considerations present here clearly distinguish this case from our treatment of AT&T in a series of orders addressing its tariffs and rate of return compliance. *See* AT&T Charges for Interstate Telephone Service, 51 FCC 2d 619 (1975); *recon. denied*, 53 FCC 2d 1073 (1975); *return prescribed* 57 FCC 2d 960 (1976); American Tel. & Tel. Co., Petition for Modification of Prescribed Rate of Return (CC Docket No. 79-63), 73 FCC 2d 689 (1979); and AT&T Charges for Interstate Service, 78 FCC 2d 661, 667 (1980). The factual circumstances present in the instant case are, again, a unique combination of factors—this Commission's continued knowing acceptance of, and failure to investigate, explicitly excessive rates, and the surrounding economic conditions that would likely have justified a higher authorized

27. We also emphasize that while Comsat could have believed that this Commission had suspended enforcement of the rate of return prescribed in the Settlement Agreement, Comsat could not have reasonably assumed, as a legal matter, that its tariff revisions were lawful merely from their effectiveness. It is well settled that a tariff's becoming effective without investigation does not imply that the tariff is ultimately lawful, or that the tariffed rates were properly targeted. Nor does its effectiveness prevent the filing of Section 208 formal complaints.[37] We are determining herein only that Comsat's reliance on our inaction is a relevant equitable factor in our analysis of Comsat's refund liability and, under the unique factual circumstances in this case, the public interest is served by exercising our equitable discretion in the manner set forth herein.

28. We are mindful of the Court's statement in *New England Telephone*, that once the Commission prescribed a maximum rate of return, "it was not reason-

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return had Comsat sought one. Neither factor was present in the AT&T context. This Commission did not once permit facially excessive AT&T rates to take effect. Nor did it fail to investigate promptly AT&T's facially excessive rates. Moreover, in an order requiring AT&T to refund excessive earnings, we concluded that the economic and financial market conditions during the refund period were similar to those that the Commission had considered at the time of the rate of return prescription. AT&T Earnings on Interstate and Foreign Services During 1978, FCC 84-567 (released Dec. 11, 1984), 49 Fed. Reg. 49502, 49504-5 (Dec. 20, 1984), *recon.*, FCC 85-284 (released May 30, 1985), *aff'd sub nom.* New England Tel. & Tel. Co. v. FCC, No. 85-1087 (D.C. Cir. August 21, 1987).

[37] *See, e.g.*, Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234-35 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920, 976 (1981); Papago Tribal Util. Authority v. FERC, 628 F.2d 235, 239-41 (D.C. Cir.), *cert. denied*, 449 U.S. 1061 (1980). For example, had a Comsat customer filed a complaint under Section 208 of the Act during this period, equitable considerations would not have barred its consideration, particularly in light of the facially excessive rates proposed in these filings.

able for the carriers to think that the agency had an affirmative policy of permitting carriers who earned [above their authorized level] . . . to retain the unlawful excess.[38] Were it not for the unique factual circumstances of this case, Comsat's expectation that it would be permitted to retain revenues in excess of its authorized return would be irrelevant to the question of its refund liability. We believe, however, that the equitable considerations identified in the preceding discussion warrant our departure from the result otherwise indicated by purely legal analysis.

29. *Earnings after August 1, 1984*—The considerations that persuade us not to require refunds for excess earnings before August 1, 1984 do not apply to the period following the August 1, 1984 effective date of tariff revisions filed in compliance with the *Second Structure Order.* In that *Order,* the Commission unequivocally re-affirmed the continuing validity of the Settlement Agreement rate of return. Thus, the Order, for the first time since 1978, gave Comsat unambiguous notice that the rate of return prescription in the Settlement Agreement remained in effect. Moreover, by mid-1984, relevant interest rates were no longer at the extraordinarily high levels prevailing in the early 1980's. Accordingly, after the release of the *Second Structure Order,* the equities are no longer balanced in Comsat's favor since it could no longer assume that our inaction on its tariffs reflected a *de facto* abandonment of the Settlement Agreement's rate of return prescription.

B. *Applicable Rate of Return*

30. The *April 6 Order* used the 12.48 percent maximum return to compute excess earnings. That is consistent with the procedure this Commission used to compute

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[38] New England Tel. & Tel. Co. v. FCC, No. 85-1087, slip op. at 18 (D.C. Cir. Aug. 21, 1987).

the AT&T-BOC refund for excess 1978 earnings[39] and the new Part 65 procedures for computing AT&T and local exchange carrier refunds for excess earnings.[40] The 1978 refund was based, and the Part 65 refunds will be based, upon the maximum return rather than the return that the carrier is supposed to use to target rates.

31. Fedex International Transmission Corporation (Fedex) and ITT World Communications Inc. (ITT World-com) have petitioned for reconsideration of the *April 6 Order*, contending that the Common Carrier Bureau erred in premising its calculations of excess revenues on the upper bound of Comsat's authorized range of return. Fedex argues that the incremental one percent can be obtained only through internal operating efficiencies, citing the Commission's instructions to Comsat in the *Second Structure Reconsiderations Order*.[41] Fedex also cites this Commission's determination in AT&T Charges for Interstate Telephone Service, 51 FCC 2d 619, 626 (1975), that the filing of a tariff designed to produce a rate of return in excess of the prescribed return is *prima facie* unlawful.[42] ITT, for its part, asserts that there is no record evidence, nor explicit finding in the Bureau's *April 6 Order*, suggesting that Comsat's excess earnings resulted from operating efficiencies. To the contrary, Comsat has conceded that its excess revenues resulted from rates explicitly targeted to a return above that prescribed in 1978.

32. In the 1975 *Comsat Rate Case*, this Commission stated that the purpose of establishing a range of rate of return "is to provide a carrier with the incentive, on a

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[39] *Id.*

[40] *See* 47 C.F.R. § 65.700 (1986).

[41] 99 FCC 2d at 1056.

[42] In American Telephone & Telegraph Co., 51 FCC 2d 619, 626, *aff'd sub nom.* Nader v. FCC, 520 F.2d 182, 204 n.25 (D.C. Cir. 1975).

rate designed to yield a return at the low end of the range, to achieve a return at the upper end of the range through operating and internal efficiencies."[43] In addition, this Commission has long recognized the imprecision inherent in requiring carriers to set tariff rates that will produce the exact level of revenues necessary to produce the anticipated return. AT&T, 9 FCC 2d 30, 51-88 (1967); AT&T, 38 FCC 2d 213, 248-51 (1972). A "buffer" increment above the prescribed return "in order to provide an incentive to increase productivity and efficiency" was employed in this Commission's 1976 prescription of a return for the AT&T system. AT&T, 57 F.C.C. 2d 960, 973 (1976).

33. In the *Authorized Rates of Return* proceeding,[44] this Commission rejected the argument that the target rate of return, rather than the upper bound of the permissible range, be used for the calculation of excess earnings by AT&T and local exchange carriers. *Authorized Rates of Return*, 58 RR 2d at 1656. We explained that the use of a range for enforcement purposes recognizes the inevitable fluctuations in a carrier's cost of capital, as well as changes in the state of the economy generally:

> Disallowing any earnings 'peaks,' while ignoring the 'valleys,' would tend to induce a systematic bias that would cause a carrier to fall short of its targeted rate of return over the long run. Such a situation is not in the interests of shareholders or in the long run interest of ratepayers.[45]

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[43] Communications Satellite Corporation, 56 FCC 2d 1101, 1173 (1975), *aff'd sub nom.* Comsat v. FCC, 611 F.2d 883 (1977).

[44] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, 58 RR 2d 1647 (1985) (*Authorized Rates of Return*), *appeal pending*, AT&T v. FCC, No. 85-1778 (D.C. Cir. May 21, 1987).

[45] Authorized Rates of Return, 58 RR 2d at 1649.

34. We did not depart from that practice by requiring in the *Second Structure Order* and reiterating in the *Second Structure Reconsideration* that Comsat properly target its rates at the 11.48 percent return level as an initial matter. The initial targeting of rates at the prescribed level of return raises concerns which differ from those raised by the after-the-fact, equitable balancing of ratepayer and shareholder interests that we are engaging in here. The cited statements were not, and could not reasonably be, intended to specify a standard for the eventual review of actual earnings, given the uncertainties of actual operations and possible changes in the economic environment, but were directed to the carrier's obligation to develop rates initially. Confirming this fundamental distinction, this Commission's consistent practice in the refund context has been to accord carriers the full "buffer" increment, as in the AT&T refund case, in which this Commission ordered the refund of only those revenues exceeding the "buffer." Moreover, Comsat's excess earnings represent the same kind of targting error that the Part 65 rules are designed to remedy and the same considerations warrant an allowance for targeting error. The same considerations also warrant viewing differentials that earlier Commissions described as an "efficiency" allowance as an allowance for targeting error. We will accordingly limit refunds to earnings that exceeded the 12.48 percent maximum return.

C. *Subject Carriers*

35. Comsat contends that because there has never been a separate Commission proceeding to determine the appropriate rate of return for the earth station operations of its subsidiary, Comsat International Communications Inc. (CICI), no refunds should be ordered in connection with its multipurpose earth station services. Comsat's assertion that CICI's distinct risk profile and its relatively small rate base distinguish it from space segment operations fails to recognize that the return prescription for

Comsat was not developed for Comsat's space segment alone. In addition, one of our considerations in allowing Comsat to retain revenues up to the limit of its return prescription, apart from the inherent imprecision of revenue targeting, is that Comsat has achieved operational efficiencies as the result of its compliance with our structural reform orders. Therefore, absent a far more persuasive showing from Comsat, equitable considerations do not warrant a distinct treatment of excess revenues attributed to CICI.

D. *Implementation of Refund*

1. Refund Methodology

36. In its proposed refund schedule and methodology, Comsat urges this Commission to implement any refund of excess revenues by a prospective rate adjustment to its customers over some period of future operations, rather than the more "classical" refund of a lump sum to parties that were customers of Comsat during the period excess revenues accrued. *New England Telephone, supra* n.15, recently held that our statutory refund authority comprehends both approaches. Therefore, we have carefully considered the equitable and administrative factors related to both.

37. Comsat contends that a lump sum refund payment in excess of $20 million would impair its flexibility and capability to maximize growth. Comsat proposes instead that its refund liability be dispersed prospectively, by offsets to future bills rendered its customers, who are primarily carriers. This approach thus contemplates no reduction in Comsat's revenue requirement or in its tariffed rates. Comsat contends such an approach better effects a flow-through of refunds to the customers of Comsat's customers, that is, end users. According to Comsat, some end users who contributed to the excess revenues, in the form of higher rates from Comsat's carrier customers, may

have since shifted to carriers that were not providing substantial service during the earlier period. Such end users would be disadvantaged by the lump sum approach, because the carriers from whom they now receive service would be entitled to receive a smaller share of the refund. Finally, Comsat states that it would add excess revenues attributable to its mulitpurpose earth station operations, which are to be discontinued at the end of 1987, to the space segment refund pool.

38. The parties commenting on Comsat's proposal observe that Comsat's proposed refund method would require carriers to continue or expand their relations with Comsat in order to recoup their refunds. Those parties contend that this result would effectively restrict competition in international services. The parties also argue that Comsat's proposal would effectively burden traditional international record carriers (IRCs) with the support of newer carriers. Those parties respond to Comsat's claim that fairness for end users is better achieved by a prospective approach by observing that some end users who previously took service from carriers who provided limited service during the accrual period may now take service from larger carriers, who provided a greater share of service during the accrual period and who would therefore be entitled to a greater share of the refund.

39. Comsat customers note that lump sum refunds were used in the first Comsat rate case, which exceeded $100 million, and refunds ordered under Bell System OCC facilities tariffs. Further, they contend, the principal difficulty associated with lump sum refunds has been the administrative difficulty and economic inefficiency of identifying and locating numerous customers who are entitled to modest refunds. Those parties say that consideration is not relevant here since Comsat's customers are small in number. Customers finally contend Comsat's proposal to calculate discounts on customer bills would constitute a violation of Section 203 of the Act, 47 U.S.C. § 203,

prohibiting rebates, and Part 61 of this Commission's Rules, 47 C.F.R. Part 61.

40. We have concluded that the disadvantages of the prospective rate adjustment approach urged by Comsat clearly outweigh its advantages. The principal beneficiary of this approach would be Comsat, when Comsat has already had the use of these excess revenues for several years. Comsat's competitors in international services would be disadvantaged in a way that would frustrate efforts to promote competition in the provisions of international services. Moreover, a prospective approach would promote time- and resource-consuming controversies over Comsat's traffic projections and the allocation of refunds between space and earth segments, as Comsat no longer owns its multipurpose earth stations.

41. Finally, Comsat's assertions regarding its ability to bear the refund burden imposed today are not substantiated sufficiently to demonstrate that the carrier's financial health or prospects would be significantly impaired. Therefore, we will order a lump sum refund payment so that end users may directly and speedily receive the benefits of these payments.

42. Consistent with the calculation of interest explained in Appendix C, we have determined Comsat's refund liability for the period from August 1, 1984 to December 31, 1986 to be that displayed in the table below, based on interest accrued to December 31, 1987 (dollars in thousands): [46]

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[46] As in Appendix C, from which these data are taken, the specified amounts for excess revenue and interest in 1985 and 1986 do not precisely agree with the total due to rounding. These amounts are subject to modification before final distribution to customers as may be necessary to correct arithmetical errors in, or make technical adjustments to. the data or calculations underlying them. We delegate to the Chief, Common Carrier Bureau, the authority to make such modifications.

Aug.-Dec. 1984	
Refund Amount	5306.0
Interest	1618.0
	6924.0
Jan.-Dec. 1985	
Refund Amount	13,856.0
Interest	2,563.0
	16,420.0
Jan.-Dec. 1986	
Refund Amount	14,139.0
Interest	1,273.2
	15,411.0
Total	38,755.0

2. Disbursement Methodology

43. While we have concluded that Comsat must refund certain excess earnings, we are not ordering that refunds be disbursed to Comsat's carrier customers at this time. We have decided to obtain additional comment on the appropriate allocation of the refund among Comsat's carrier customers and on several flow-through questions before we order disbursements. We will accordingly require Comsat to place the entire refund amount in an escrow on or before February 29, 1988, and will issue instructions for payments from the escrow in a subsequent order.[47] The actual interest earned on the escrow account will inure to the ultimate beneficiaries.

44. The Bureau's *April 6 Order* tentatively concluded that Comsat's carrier customers should be required to pass through to their customers any refunds they receive

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[47] There is no reason to delay refunds owed to Comsat's end user customers, since these customers and their relative usage are easily identified. Such funds should be disbursed by Comsat prior to February 15, 1988.

from Comsat. This determination is consistent with prior Commission practice in implementation of rate reductions.[48] Comsat's non-dominant international carrier customers, in responding to Comsat's proposed refund methodology, have criticized the Bureau's proposed flow-through requirement on a variety of grounds. First, they state that a mandated flow-through would be inconsistent with their non-dominant status. They argue that flow-throughs should not be ordered for entities who are not rate-base regulated.[49] Second, these carriers indicate that their rates are driven by market forces to be close to costs, that they have not overcharged end-users (and indeed have "absorbed" a portion of Comsat's overcharges), and that their returns have been substantially less than Comsat's. Third, they state that past Commission practice (i.e., ordering a flow-through) is not relevant since the question of flow-throughs for non-dominant carriers is a case of first impression. They conclude by arguing that flow-throughs are discretionary and should not be ordered for non-dominant carriers under the existing circumstances. In its comments, AT&T states that until a refund mechanism is finalized it would be premature to attempt to establish the specifics of a flow-through plan. AT&T suggests that Comsat's carrier customers receiving refunds be permitted to propose a method of treating those refunds after the refund mechanism is adopted.

45. We remain convinced that these refund payments should inure to the benefit of ratepayers. Non-dominant carriers pricing close to cost because of market forces will recieve what amounts to a significant reduction in their

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[48] *See* American Tel. & Tel. Co., Docket No. 20639, 56 FCC 2d 821 (1975), modified, 67 FCC 2d 966 (1978), proceeding terminated, 90 FCC 2d 1233 (1982); American Tel. & Tel. Co. (Hawaii Transponder Case), 45 FCC 2d 252 (1974); Authorized Entities and Authorized Users, 4 FCC 2d 421, 434 (1966).

[49] International Competitive Carrier Policies, CC Docket No. 85-107, 59 Pike & Fischer R.R. 2d 283 (November 15, 1985).

costs. We believe that their rates should reflect such cost reductions.[50] Dominant carriers, for their part, will be receiving payments which should be reflected in their accounts and rate development calculations. Nevertheless, we believe that the record warrants giving Comsat's carrier customers a specific opportunity to further address this issue and propose a specific flow-through methodology. Accordingly, interested parties may file comments on these issues no later than 30 days from the release date of this Order. Replies may be filed by any party fourteen days thereafter. In their filings, Comsat's carrier customers should propose specific methodologies for implementing flow-throughs of Comsat's refund. These parties should also identify the portion of Comsat's refund to which they believe they are entitled, as well as the data and calculations underlying their claim.[51]

IV. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 201(b) and 205(a) of the Communications Act, 47 U.S.C. §§ 4(i), 201(b), and 205(a), that Comsat is required to refund to its customers taking service between August 1, 1984 and December 31, 1986, the aggregate sum of $38,755 million dollars, representing the revenues accrued during that period in excess of 12.48 percent return and accrued interest as calculated in Appendix C, to be apportioned between these customers on a basis reflecting the charges for service incurred by customers. The aggregate sum, less amounts due to end user customers, shall be deposited in an interest bearing escrow account on or before February 29, 1988 and the costs of administering that account shall be borne by

[50] We note that the non-dominant international carriers were not classified as such by this Commission until well after the mid-point of the period involved.

[51] *See*, ITT World Communications Inc., 70 FCC 2d 1316, 1328-30 (1978).

Comsat. The simple interest accruing from December 31, 1987 to the date of deposit in escrow shall be calculated by Comsat consistent with the method of Appendix C, using the current Internal Revenue Service rate, and added to the $38.755 million figure stated above. Sums owed to end user customers shall be paid by Comsat on or before February 29, 1988 and the aggregate refund sum placed in escrow reduced accordingly.

47. IT IS FURTHER ORDERED that the Secretary shall, by registered mail, serve a copy of this decision upon the Communications Satellite Corporation in accordance with Sections 416 and 413 of the Communications Act of 1934, as amended, and shall enter proof of service in the docket in this proceeding.

48. IT IS FURTHER ORDERED that the Secretary shall transmit a copy of this order to the American Telephone & Telegraph Co., and to each party filing comments in this proceeding.

49. IT IS FURTHER ORDERED, that in addition to the filing requirements generally imposed by this Commission's Rules for docketed investigations, a separate copy of pleadings responsive to this Order shall be filed with the Commission's commercial contract duplicator; the Chief, Common Carrier Bureau; the Chief, Tariff Division; the Chief, International Facilities Division; and the respective divisions' reference rooms.

50. IT IS FURTHER ORDERED, that the Chief, Common Carrier Bureau is authorized to require Comsat to make such minor adjustments to the escrowed amount as may be necessary to correct errors in, or reflect technical modifications to, the data or calculations underlying the refund ordered herein.

51. IT IS FURTHER ORDERED that the petitions for reconsideration filed by Fedex International Transmission Corporation and ITT World Communications, Inc. ARE DENIED.

52. IT IS FURTHER ORDERED, that comments on the flow-through issue discussed herein SHALL BE FILED not later than 30 days after release of this Order, and replies SHALL BE FILED not later than 45 days after release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

Comsat filed its response to the show cause elements of the *April 6 Order* May 15, 1987, but failed to submit a refund methodology. Pursuant to the Bureau's procedural consolidation order of Jun. 17, 1987, 2 FCC Rcd. 4417, Comsat submitted its proposed refund schedule and methodology July 10, 1987; parties' comments on that proposal and on Comsat's response were submitted July 31, 1987 in various configurations. Fedex International Transmission Corporation (Fedex) submitted separate pleadings addressing (i) Comsat's response and (ii) refund and flow-through issues. FTC Communications, Inc. (FTCC) and MCI Communications Corporation (MCI), the latter on behalf of Western Union International (WUI), MCI Telecommunications Corporation (MCII) and MCI International, Inc. (MCII), each submitted comments on the refund methodology and flow-through issues. TRT Telecommunications Corporation (TRT) and Univision, Inc. (Univision) each addressed Comsat's response and its refund methodology in integrated comments, while Turner Broadcasting System, Inc. (TBS) limited its response to the proposed refund method, as did Pan American Satellite (PAS) and RCA Global Communications, Inc. (RCA Globcom)-Capital Cities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc. (Networks) also commented on Comsat's refund proposal. Additionally, the Bureau's procedural consolidation order

(DA 87-735, released June 17, 1987) did not rule on Univision's request that its comments on the networks' joint application for review of the *April 6 Order* be accepted as an additional pleading under Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45. Univisions' comments endorsed concerns raised by the networks respecting Comsat's treatment of Intelsat cost components in the development of occasional television service rates. While the networks have withdrawn their application for review (n4, *infra*), the concerns raised by Univision were originally proffered under its previous corporate name (SIN, Inc.) in petitions directed to the television tariff revisions captioned in the Bureau's investigation, and Univision's comments will be included in the record for subsequent consideration of those issues.

APPENDIX B

Table 1

Rate of Return Prescribed for COMSAT
as Calculated under the Settlement Agreement
Adopted in Docket No. 16070

	Equity Capital		Debt Capital		Weighted Average
Year	Return	Weight	Return	Weight	Cost of Capital
	(A)	(B)	(C)	(D)	(E=A*B+ C*D)
1978	12.2%	1.00	9.0%	0.00	12.20%
1979	12.2%	0.91	9.0%	0.09	11.91%
1980	12.2%	0.82	9.0%	0.18	11.62%
1981	12.2%	0.73	9.0%	0.27	11.34%
1982	12.2%	0.64	9.0%	0.36	11.05%
1983	12.2%	0.55	9.0%	0.45	10.76%

Average return over 6 year period: 11.48%

Notes:

Column (A)—The current long-term government bond yield (8.2 percent at the signing of agreement) plus a 4 percent risk premium.

Column (B)—100% equity financing assumed in first year, declining to 55 percent at the end of six years.

Column (C)—The cost of debt was assumed to be the rate for an A-rated public utility. (9.0 percent at signing of agreement)

Column (D)—Debt to be acquired at the rate of 9 percent per year, starting in 1979 and continuing until 45% of capital is reached.

APPENDIX B

Table 2

Docket No. 16070 Prescription Methodology, Adjusted to Actual Interest Levels

	Equity Capital		Debt Capital		Cumulative Weighted Average
Year	Return	Weight	Return	Weight	Cost of Capital
	(A)	(B)	(C)	(D)	(E=A*B+ C*D)
1978	12.20	1.00	9.00	0.00	12.20
1979	12.74	0.91	10.20	0.09	12.51
1980	14.81	0.82	12.89	0.18	14.22
1981	16.87	0.73	15.29	0.27	15.77
1982	16.23	0.64	15.43	0.36	15.23
1983	15.84	0.55	13.10	0.45	14.73

Average return over 6 year period: 14.11

Notes:

Column A—Assumed to be the current long-term government bond yield plus a 4 percent risk premium. The entry for 1983 includes an extra one percent risk premium to reflect that COMSAT had obtained a capital structure with 45 percent debt.

Column B—100% equity financing assumed in first year, declining to 55 percent at the end of six years.

Column C—Return on Moody's A Rated Corporate Bonds, from Survey of Current Business, US Dept. of Commerce, various issues.

Column D—Debt financing to increase by 9 percent per year, starting in 1979 and continuing until 45% of capital is reached.

Column E—The weighted average cost of capital is equal to the cost of equity times its weight in the capital structure plus the cost of debt times its capital structure weight. The calculation underlying these figures assumes that the cost of each increment of debt is the cost of debt in the year it was added.

APPENDIX C

COMSAT Refund Liability
For the Period August, 1984 through December, 1986
(Dollars in Thousands)

Year	Avg Net Invest	Net Op Income	Return Earned (Annual)	Excess Earnings (r=.1248)	Excess Revenue
	(A)	(B)	(C=B/A)	(D=Ar-C)	(E=D/1-t)
1984	$398,266	$23,421	14.11%	$2,711	
1985	$404,843	$57,605	14.23%	$7,081	$13,856
1986	$421,338	$59,808	14.19%	$7,225	$14,139
Total					$33,301

Interest:

1985	1986	1987	Total	Refund Revenue + Interest
(F=.12E)	(G=.095E)	(H=.09E)	(I=F+G+H)	(J=E+I)
$637	$504	$478	$1,618	$6,924
$0	$1,316	$1,247	$2,563	$16,420
$0	$0	$1,273	$1,273	$15,411
			$5,454	$38,755

Notes:

The *April 6 Order's* tentative refund calculation did not include excess revenue data for July, 1985 because changes in Comsat reporting procedures made to reflect the *Second Structure Order* result in a discontinuity in the data reported monthly by Comsat on its Form 901 between June and July, 1985. Specifically, data presented by Comsat for the months prior to July, 1985 (Revised Exhibit D1 at 1-8) are for combined earth and space operations, while data presented for the months of July 1985 and later (Revised Exhibit D1 at 9) separate space and earth operations. The figures adopted today reflect inclusion of data for July, 1985. Consistent with the rate base calculation methodology used in the *April 6 Order*, we have developed rate base and revenue data for July 1985 by combining the separately reported figures for Comsat's earth and space segment operations.

Columns A&B—Data for August, 1984 through June 1985 taken from Comsat Response (dated March 3, 1986, revised July 9, 1986), Exhibit D1, pages 7-8. Data for July, 1985 through December, 1986 taken from FCC Form 901.

Column A is calculated by adding the end of month rate base for the current month with the previous month and dividing by two.

Column C—The 1984 row covers only the last five months of the year. The realized rate of return was annualized by multiplying B/A by 12/5. The 1985 and 1986 rows cover full years.

Column D—The excess earnings calculations assumes an allowed rate of return of 12.48%.

Column E—The calculation assumes a 48.9% tax rate. E=D*(1-.48.9)

Column F—The interest rate used for 1985 is the average of the Internal Revenue Service (IRS) refund interest rates in effect in 1985. Jan-Jun: (13%); Jul-Dec: (11%). *See* IRS Notice 746.

Column G—The 1986 interest rate was the average of the Jan-Jun: (10%) and July-Dec: (9%) IRS rates.

Column H—The 1987 interest rate was the Jan-Dec: (9%) IRS rate.

Column I—The sum of Columns F through H. Note that interest computations assume that refund liabilities were incurred at the end of each year, and that the refund will be made on December 31, 1987. The interest computations assume no compounding.

Column J—The total refund obligation as of 12/31/87 is the sum of columns E and I. The sum of E and I differs from Column I for 1985 and 1986 due to rounding.

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 85-1087, 85-1457, 85-1471, 85-1472

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,
Respondents,

GTE SERVICE CORP., *et al.*, NATIONAL TELEPHONE CO-OPERATIVE ASSOCIATION, *et al.*, AMERICAN TELEPHONE & TELEGRAPH CO., AMERITECH OPERATING CO., MOUNTAIN STATES TELEPHONE & TELEGRAPH CO., *et al.*, SATELLITE BUSINESS SYSTEMS, U.S. TELEPHONE ASSOCIATION, TELECOMMUNICATION RESEARCH & ACTION CENTER, SOUTH CENTRAL BELL TELEPHONE CO., SOUTHWESTERN BELL TELEPHONE CO.,
Intervenors.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,
Respondents,

U.S. TELEPHONE ASSOCIATION, GTE SERVICE CORP., *et al.*, MOUNTAIN STATES TELEPHONE & TELEGRAPH CO., *et al.*, BELL OPERATING COMPANIES, SOUTHWESTERN BELL TELEPHONE CO.,
Intervenors.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,
Respondents,

GTE SERVICE CORP., *et al.*, AMERITECH OPERATING CO., AMERICAN TELEPHONE & TELEGRAPH CO., BELL OPERATING COMPANIES, SOUTHWESTERN BELL TELEPHONE CO.,
Intervenors.

PACIFIC BELL, *et al.*,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,
Respondents,

GTE SERVICE CORP., *et al.*, MOUNTAIN STATES TELEPHONE & TELEGRAPH CO., *et al.*, AMERITECH OPERATING CO., AMERICAN TELEPHONE & TELEGRAPH CO., BELL OPERATING COMPANIES, SOUTHWESTERN BELL TELEPHONE CO.,
Intervenors.

Argued Oct. 30, 1986

Decided Aug. 21, 1987

Before MIKVA and BUCKLEY, Circuit Judges, and PARSONS, Senior District Judge.

Opinion for the Court filed by Circuit Judge MIKVA.

Dissenting opinion filed by Circuit Judge BUCKLEY.

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* Of the United States District Court for the Northern District of Illinois, sitting by designation pursuant to 28 U.S.C. § 294(d).

MIKVA, Circuit Judge:

Petitioners American Telephone and Telegraph Company ("AT & T") and numerous former Bell operating telephone companies ("BOCs") seek review of orders of the Federal Communications Commission ("the Commission") requiring them to grant rate reductions. The reductions are designed to reimburse consumers for earnings enjoyed by AT & T and the BOCs in 1978 which were over and above a rate-of-return ceiling previously prescribed by the Commission. Petitioners challenge the orders on a number of grounds, the most substantial of which is that the Commission had no authority under the Communications Act to impose such a remedy. We conclude that the Commission had ample authority to order reductions to enforce its prior rate-of-return prescription, and we deny the petitions for review.

I. Background

A. *Regulatory Structure*

The Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C.) (the "Act"), provides the regulatory ratemaking scheme within which these petitions arise. Section 203 of the Act places primary responsibility for initiating rate revisions upon the carrier. 47 U.S.C. § 203. Once a carrier initiates a revision, the Commission is empowered under section 204 of the Act to suspend implementation of the proposed tariff for up to five months while it investigates the lawfulness of the proposed rates. 47 U.S.C. § 204. If the Commission's investigation is not completed within that time, the proposed tariff automatically goes into effect. In such a case, however, section 204 empowers the Commission to make the increases subject to an accounting and refund order: if the Commission later determines that the revisions are excessive, it may order the carrier to refund the unjustified amount to those customers who

have been overcharged. *Id.; see Nader v. FCC*, 520 F.2d 182, 198 (D.C.Cir.1975).

Section 205 of the Act, which is of particular relevance to this dispute, governs the Commission's authority to regulate existing rates. Under section 205, the Commission can initiate an investigation into any carrier rate or practice. If the Commission determines that a carrier rate is or will be unlawful under the Act, it may prescribe the "just and reasonable charge . . . to be thereafter observed." 47 U.S.C. § 205. This power of prescription is a potent tool: once the Commission issues a prescription order under section 205, the carrier must "cease and desist from such violation . . . and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum . . . so prescribed." *Id.*

The Commission in this case also relied on section 4(i) of the Act. That section authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). As we detail below, section 4(i) previously has been held to justify the use of rate-of-return prescriptions, as opposed to prescriptions of actual rates.

B. *Regula'ory History*

Although it had recommended appropriate return levels as early as 1967, the Commission first began to use its section 205 powers to prescribe a rate of return, as opposed to a prescription of actual rates, for the AT & T system in 1972. The Commission decided to undertake a rate-of-return prescription because AT & T had become so huge and diverse that individual rate determinations for each service were impractical. The 1972 order fixed a rate of return of 8.5% and rejected proposed AT & T tariffs that would have provided the compay with a higher

return. AT & T's challenge to that order called on this court to determine whether the Commission's section 205 powers permitted the agency to prescribe rates of return as well as rates. *See Nader v. FCC*, 520 F.2d 182, 199-205 (D.C.Cir.1975). In *Nader*, we determined, as a threshold matter, that the Commission's order fixing a rate of return was indeed a prescription. We concluded that "[w]e would be shirking reality if we did not recognize that the practical effect of the Commission's . . . order was to limit prospectively AT & T's rate of return to 8.5%, and thus [the order] was a prescription under section 205." *Id.* at 201; *see also id.* at 202 (the Commission's order was intended "to have the prospective effect of a prescription, thus, limiting the utility to that return.").

We then found that the Commission's prescription of a rate of return was consonant with the agency's statutory authority under the Act. *Id.* at 203-05. Even though section 205 refers only to the Commission's power to prescribe "charges, classifications, regulations and practices," we found that prescription of a rate of return was proper under section 4(i), which gives the Commission the power to issue such orders "as may be necessary to the execution of its functions." *Id.* at 203. In holding that "the Commission lawfully prescribed a rate of return for AT & T," *id.* at 204, we noted that "the effect of the prescription is to protect AT & T from the possibility of refunds on the ground that an 8.5% rate of return was too high, [although] the Commission retains full latitude to order refunds on all other grounds." *Id.* at 205 n. 25.

With the issue of its power to prescribe rates of return thus settled, the Commission proceeded in 1976 to set a rate of return of 9.5% for the AT & T system. *See American Tel. & Tel. Co.*, 57 F.C.C.2d 960 (1976). The Commission added to the 9.5% figure a buffer of .5% "in order to provide an incentive to increase productivity and efficiency." *Id.* at 973. In effect, while the Commission

prescribed a 9.5% rate, it let AT & T know in advance that it would tolerate "a level or range of interstate earnings not to exceed 10%" before it took remedial action. *Id.*

AT & T responded to the Commission's prescription by filing a tariff structure designed to produce no more than a 10% rate of return. Without making a specific finding that they were just and reasonable, the Commission permitted these rates to go into effect on March 1, 1976. In 1976 and 1977, the rates produced a rate of return under 10%. However, the same rates in 1978 resulted in a rate of return which all parties agree exceeded the prescribed 10% ceiling.

Although it took a great deal of time to do so, *see Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C.Cir.1984), the Commission eventually responded to AT & T's excessive rate of return in December of 1984, when it ordered the company to reduce its rates to refund the excess earnings to consumers. *See* J.A. 23-33. In its order, the Commission rejected AT & T's argument that the 1976 prescription was meant to be not a ceiling on AT & T's rate of return but only a target for setting rate levels; the Commission observed that the plain language in the prescription order restricted AT & T to a return of not more than 10%. J.A. 27. The Commission cited to sections 205 and 4(i) of the Act, as well as our decision in *Nader*, in justifying its authority to enforce its prescription by ordering refunds. J.A. 28. The Commission also rejected AT & T's argument that changing economic conditions had rendered the 10% rate of return unlawfully low and therefore precluded the Commission's enforcement of the rate. The Commission explained that under the Act the carrier bears primary responsibility for initiating changes in existing prescriptions; since AT & T had initiated no such revision, the 1976 prescription remained in effect in 1978. J.A. at 27.

The Commission determined that AT & T had enjoyed a 10.22% rate of return in 1978. The Commission derived the 10.22% figure from AT & T's own Interstate Monthly Report ("IMR"), which AT & T had filed with the Commission in January 1979. AT & T subsequently had submitted an "FDC Report" in which the company maintained that its rate of return for 1978 had been 10.09%. In the proceeding leading up to the orders under review, AT & T urged the Commission to compute the rate reductions based on the 10.09% figure. AT & T insisted that the 10.22% figure did not adequately account for certain services and facilities provided to other common carriers, and that integrating the relatively slight earnings of those services and facilities into the computation resulted in a net rate of return of 10.09%. The Commission, however, chose to rely on the IMR, as it had for the previous 28 years in computing AT & T's rate of return. The 10.22% reflected excessive 1978 earnings for AT & T in the amount of one hundred one million dollars. The Commission ordered AT & T and its former operating companies (AT & T had by this time been divested) to lower its rates by an amount sufficient to reimburse ratepayers for that amount plus interest. J.A. 26.

In two reconsideration orders, the Commission substantially reaffirmed its December 1984 order, imposing only slight alterations not at issue here. *See* J.A. 43-80. Specifically, the Commission again concluded that it had the statutory authority to impose the refunds on AT & T and the BOCs, that its decision did not represent a reversal of longstanding policy not to impose refunds for violations of prescriptions, and that AT & T had earned a 10.22% rate of return in 1978. AT & T and ten BOCs responded with these consolidated petitions for review. The petitioners' efforts to overturn the Commission's orders are championed in whole or in part in intervenors' briefs filed by the Ameritech Operation Companies, the United States Telephone Association, and GTE, and an

amicus curiae brief filed by the Communications Satellite Corporation.

II. Discussion

Petitioners make three basic challenges to the Commission's orders. The first, and most important, of their contentions is that the Commission has no authority under the Communications Act to impose refunds for earnings in excess of a prescribed rate of return. A second and related argument is that even if the order did not violate the Act, it departed from prior policy without adequate explanation and with unfairly retroactive effect. Third, petitioners allege various infirmities in the Commission's methods of calculating the amount of the refund liability. We address each of these contentions in turn.

A. *Statutory Authority*

Petitioners' challenge to the Commission's authority to issue the orders under review reveals two points of fundamental opposition to the agency's view of its regulatory authority. First, petitioners differ with the Commission as to the effect of the 1976 prescription. They contend that the nature of their obligation was merely to try in good faith to formulate rates that would not produce an excessive return. In the Commission's view, by contrast, the prescription imposed a maximum return that the carriers could not exceed, however innocently. Petitioners also argue that in any event the Commission has no power to impose refunds to remedy a violation of rate-of-return prescriptions. This argument as to remedy is linked to the first contention: if the prescription obliged the carriers only to design responsive rate, the Commission would be overreaching in adopting a remedy that in effect retroactively adjusts rates that appeared reasonable when implemented. We consider first the nature of the Commission's power to perscribe rates of

return and then take up the related issue of the Commission's remedial reach.

Petitioners acknowledge that once the Commission prescribes a rate of return, they are required to submit rates *designed* to achieve no more than that rate. Under petitioners' view of the regulatory scheme, however, that is all they are required to do; if they err, and rates designed to achieve a lawful return turn out to generate an excess, the prescription has not been violated. Petitioners' argument, in short, is that the Commission may prescribe constraints only on carriers' subjective efforts, not on future events. We see no reason to adopt this narrow reading of "prescription," especially when it is opposed by a more reasonable interpretation by the Commission. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). The Commission's chief concern in issuing prescriptions is protecting just and reasonable rates, not policing carriers' states of mind. The idea of a prescription under section 205 is that the agency has proclaimed that a certain situation—here a return in excess of 10%—is unlawful and *shall not occur.* Certainly carriers cannot intentionally try to violate an outstanding prescription, but that does not mean that they may achieve through inadvertence what they are forbidden from doing by design.

A central defect in petitioners' argument is a failure to recognize the import of our prior decision in *Nader* approving the Commission's authority to prescribe rates of return. *Nader* established that the Commission may determine what *rate of return* must be thereafter observed in the same way it may set a just and reasonable *rate* to be thereafter observed. We expressly recognized as much when we wrote that the Commission's order had "the prospective effect of a prescription, thus, *limiting the utility to that return.*" *Nader, supra*, 520 F.2d at 202 (emphasis added). Here the Commission has ex-

ercised its legal prerogative to prescribe a rate of return, rather than a rate. The teaching of *Nader* is that such a prescription is no less binding. If the order setting the maximum rate of return was a valid section 205 prescription, as it clearly was after *Nader*, it had "the force of a statute. . . . The carrier . . . is bound to conform." *Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 52 S.Ct., 183, 76 L.Ed. 348 (1931). *See also American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865, 874 (2d Cir.1973) (carriers are compelled to adhere to prescriptions by Commission).

Having established that the Commission reasonably determined that AT & T's 1978 earnings violated the outstanding prescription, we turn to the question of remedy. Petitioners insist that no section of the Act empowers the Commission to grant refunds for a violation of a prescription. Petitioners point out that section 204 is the only provision in the Act to expressly mention "refunds," and it applies only to Commission action following suspension of new or revised rates; the order under review corrected rates that already had been in effect for two years. Section 205, petitioners observe, is forward-looking: the Commission uses it to prescribe charges and practices "to be thereafter observed." In petitioners' view, by contrast, the Commission's order was a classic example of retroactive ratemaking, which is forbidden under a plethora of case law interpreting sections 204 and 205 and similar provisions in analogous regulatory schemes. Finally, petitioners argue that the Commission cannot cure its lack of authority by reliance on section 4(i), because that provision authorizes only such orders as are "not inconsistent with this Act," and retroactive refunds are inconsistent with the Act.

The petitioners buttress their textual arguments with an observation that the prohibition against retroactive ratemaking is designed to achieve an overall regulatory balance between the interests of consumers, who need

protection from unreasonably high rates, and those of carriers, who need assurance of a reasonable rate of return. Under the prospective ratemaking scheme, carriers are precluded from recouping shortfalls during lean years, but they are compensated by being permitted to retain excess earnings from unexpectedly profitable years. This balance, petitioners argue, is destroyed if the Commission can order refunds to enforce a ceiling on a carriers' return without also guaranteeing the carriers some minimum reasonable return.

In addressing petitioners' concerns, we note at the outset that although petitioners and the Commission both refer to the rate reductions as a "refund," the order does not impose a refund in the classic sense of restitution to an overcharged party. Here the reductions will accrue to the benefits of a different customer base from the base that contributed to AT & T's excessive earnings. The Commission's order therefore is more precisely considered a prospective rate adjustment to compensate for past surpluses. *See* J.A. 26. This case does not, however, turn on the arguably overfine semantic distinction between a refund and a prospective adjustment; even allowing for argument's sake that the Commission imposed a refund, the order was well within the agency's statutory authority.

As petitioners observe, section 204 is the only provision of the Act explicitly to mention refunds, and it does not apply to the circumstances of this case. The Commission, however, relied on another section of the Act—section 4(i)—to impose rate reductions in the amount of AT & T's excessive 1978 earnings. That provision empowers the agency to perform any act "not inconsistent with this Act, as may be necessary in the execution of its functions." We find this wide-ranging source of authority adequately supports the Commission's remedial action. In a strictly technical sense, the Commission's choice of remedy was absolutely necessary; without the reductions,

the carriers in fact would not be limited to a return of 10% and the prescription would be violated. More generally, the Commission enjoys a significant discretion to choose among a range of reasonable remedies, including refunds. *See Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.D.Cir. 1981). The Commission does not have to show that it selected the only conceivably appropriate remedy in order to invoke its 4(i) powers. *See North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir.1985) (section 4(i) is a "necessary and proper clause" empowering the Commission to "deal with the unforeseen . . . to the extent necessary to regulate effectively those matters already within the boundaries"). Although, as petitioners point out, there are other corrective measures the Comission might have chosen, the measure it adopted in this case was appropriate and reasonable. As we said recently in another case approving of an agency's refund order, "[t]he question eventually reduces to one of judgment, informed by the policy of the statute that Congress has seen fit to enact. We find the agency's judgment . . . to be fully consistent with the Commission's broad mandate from the Article I branch to assure that all rates are just and reasonable." *Southern California Edison Co. v. FERC*, 805 F.2d 1068, 1072 (D.C.Cir.1986).

Petitioners nevertheless insist that a refund remedy is inconsistent with the Act, and therefore an inappropriate exercise of power under section 4(i), because it amounts to retroactive ratemaking. This argument again overlooks the force of our decision in *Nader* and the Commission's subsequent 1976 rate-of-return prescription. There was not retroactive ratemaking here, because the carrier's obligations were set prospectively in 1976, when the Commission forbade AT & T from earning more than 10%. The 1984 order under review merely recognized that the prior prescription had been violated and imposed a remedy for that violation. As the Commission explained, the refund order is a "dispassionate remedy

for a violation in fact of an earnings ceiling. The carriers are being required merely to give up what they never should have collected in light of the rate of return prescription." FCC Br. 25 n. 31. This case is thus no different from one in which the Commission prescribed actual rates and the carrier, either intentionally or inadvertently, collected higher charges. Although no carrier has yet been so brazen, there can be little doubt under such circumstances but that the Commission would be well within its authority in forcing the carrier to disgorge the unlawful excess. *Cf. United States v. Corrick*, 298 U.S. 435, 56 S.Ct. 829, 80 L.Ed. 1263 (1936) (Commission can reject rate *filings* in excess of prescribed rates). The Commission has no more engaged in retroactive ratemaking here just because it is acting to enforce a rate-of-return prescription rather than a rate prescription.

Nor does the Commission order foster an impermissible imbalance between the interests of carriers and those of consumers. First, the Commission's 1976 prescription did provide a measure of protection for the carriers. As we noted in *Nader*, "the effect of the prescription is to protect AT & T from the possibility of refunds on the ground that an 8.5% rate of return was too high." 520 F.2d at 205. n. 25. Thus, had the cost of capital plunged in 1977, so that AT & T's return in that year of 9.59% was far above the reasonable minimum necessary to attract continued investment, the Commission nevertheless would not have been able to order a refund; rather, it would have had to initiate a new Section 205 proceeding and issue a new rate-of-return prescription, which would have had prospective force only.

It is true that the current regulatory scheme is asymmetric on another level. Since the Commission has so far declined to set minimum guaranteed rates of return for the carriers (although it has not foreclosed the possibility of doing so in the future), carriers must refund ex-

cess earnings, but they are not compensated for shortfalls. The carriers, however, have no statutory entitlement to a perfectly balanced regulatory scheme; rather, they are entitled only to earn an overall reasonable return. The Commission has concluded that a guaranteed minimum annual return is not essential to protect that right. That conclusion is a reasonable one. Under the Act, the carriers have the opportunity and responsibility to file rates that provide an adequate return. In this sense they are unlike consumers, who rely predominantly on the Commission to protect their right to just and reasonable rates. Moreover, the Commission supplements its rate-of-return prescriptions with a buffer, in this case amounting to .5%. This added increment makes it easier for the carriers to design charges that provide a rate of return in the vicinity of the prescribed ceiling. This scheme, in fact, more than adequately protected the carriers' interests in relation to the 1976 rate-of-return prescription at issue. During the five-year period in which the prescription was in effect, AT & T earned less than the prescribed ceiling of 9.5% in only one year, 1976 when it earned 9.25%. Overall, its average earnings during that period were 9.69%, well *above* the prescribed limit. In three of the five years, the carrier's rates were designed precisely enough to produce a return above the ceiling but not so far above as to trigger a Commission remedy. Finally, the carriers can always initiate a request to increase their rates when the current tariff appears likely to result in a shortfall. Thus, the current system appears to provide ample protection for the carriers' interests without any guaranteed minimum rate of return. Should this state of affairs not hold in the future, the Commission and the courts can address the situation at that time.

In sum, the Commission was justified in finding that AT & T's excessive earnings in 1978 violated the agency's outstanding rate-of-return prescription. Having made that finding, the Commission properly exercised its

authority under section 4(i) to remedy the violation by ordering rate reductions in the amount of AT & T's excessive earnings in 1978.

B. *Retroactive Application of a Newly-Announced Policy*

Several petitioners argue that even if the Commission's order did not violate the Act, it represented an abrupt reversal of prior Commission policy which could not lawfully be applied to parties who relied on the previous state of affairs. As AT & T sees it, for example, the Commission previously had followed a "target/trigger" policy, under which rate-of-return prescriptions served as targets for carrier tariffs, and excessive earnings triggered prospective relief in the form of rate adjustments. AT & T argues that it is being unfairly subjected to newly-adopted regulatory standards to which it has not had an opportunity to conform its behavior.

In large part, this claim relies on the same premise as the argument that the prescription obliged the carriers only to design rates not to exceed the Commission's ceiling. To the extent it does, we reject it for the same reasons. Once the Commission prescribed a maximum rate of return of 9.5% with a .5% buffer, it was not reasonable for the carriers to think that the agency had an affirmative policy of permitting carriers who earned above 10% to retain the unlawful excess. It is true that the Commission had not put the carriers on specific notice that it would respond to unlawfully high returns by ordering refunds. Importantly, however, the Commission had not had occasion to do so; never before had a carrier exceeded a rate-of-return prescription.

The dissent contends that carriers twice before—in 1967 and 1968—exceeded the prescribed rate of return. Dissent at 4, 9-10. This contention is a cornerstone of the dissent's argument that the enforcement scheme adopted in this case represented a radical change in policy. The dissent overlooks the vital point that the Commission first

prescribed a rate of return in 1972. Although it incorporated a rate-of-return recommendation, the 1967 order was not a rate-of-return prescription, and thus the portion of that order the dissent cites, *see* dissent at 4, is immaterial. The whole point behind our decision today, and our previous holding in *Nader*, is that the ratemaking regime changed in 1972 when the Commission began to use its section 205 powers to prescribe rates of return. That action represented a new approach to rate regulation, and its legitimacy was precisely what the fight was about in *Nader*.

Given that no carrier had ever exceeded a prescribed rate of return and that the Commission had never foreclosed the remedy it imposed in this case, the most petitioners can claim is that the order under review instituted a new policy for a new situation. This action is something very different from a departure from a clear prior policy. We recently recognized the distinction in rejecting a very similar claim that an agency refund order was a departure from prior precedent. Petitioner in that case contended that the Federal Energy Regulatory Commission retroactively applied a new policy when it ordered a refund of excessive earnings. *See Southern California Edison Co. v. FERC*, 805 F.2d 1068 (D.C. Cir.1986). The court noted, "no agency precedent expressly addresses this precise issue. . . . We are in new territory here." *Id.* at 1071. Confronted with a novel set of circumstances, as we are in this case, the court rejected petitioner's claim that the Commission had departed from prior policy.

Finally, even if the enforcement order instituted a departure from a previous clearly articulated policy, petitioners would have no right to have the "new" policy not apply to them. Generally speaking, an agency may be prevented from applying a new policy for one of two reasons (in addition to the standard constraints that apply to any agency decision). First, a departure from prior policy cannot stand when the agency fails to ex-

plain the reason for the change. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir. 1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed. 2d 701 (1971). Second, under certain circumstances an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy. *See RKO General v. FCC*, 670 F.2d 215, 223 (D.C.Cir.1981), *cert. denied*, 456 U.S. 927, 102 S.Ct. 1974, 72 L.Ed.2d 442 (1982). Petitioners can avail themselves of neither of these doctrines. As we detailed above, the Commission amply explained the source and need for its authority to remedy violations of its prescriptions by imposing refunds. This explanation fulfilled the Commission's responsibilities under *Greater Boston*. As for the retroactivity claim, petitioners have made no showing whatsoever of detrimental reliance. Indeed, it is difficult to imagine how they might make such a showing. Petitioners have insisted, as they must, that they made every effort to comply with the prescription by designing rates that would produce earnings of less than 10%. Presumably they would have behaved no differently had they clearly understood that excessive earnings might trigger a refund order. Thus, there is no evidence that petitioners relied to their detriment on their understanding of the Commission's prior policy. In sum, even had petitioners demonstrated, which they have not, that the Commission's order departed from prior policy, they would have no equitable claim to shield them from application of the order to them.

The dissent posits that AT & T relied on an enforcement scheme that precluded refunds by not filing for rate increases and by not having an opportunity *in 1978* to convince the agency that its earnings were reasonable under then-prevailing economic conditions. Dissent at 13-15. But AT & T had every incentive and opportunity to file for an increase if it believed that the outstanding rate-of-return prescription was inadequate. It is irrational to surmise that the carrier would have declined

to try to maximize its allowable protfis in 1979 because it believed it would be able to retain its windfall of 1978. As for its opportunity to protest the decision, AT & T has offered a fierce challenge now, so no remedy has been assessed without the carrier's having had a full opportunity to air all its claims. We thus can perceive no possibility of detrimental reliance in this case.

C. *Computation of the Refund*

Three final arguments address the Commission's actual computation of petitioners' liability. First, petitioners claim that the Commission should have calculated the carriers' rate of return over the entire period during which the rates at issue were in effect, rather than isolating AT & T's excessive earnings for 1978. The rates were in effect from 1976 to 1980, during which they produced an overall rate of return of 9.69%. The Commission admittedly gave only a cursory explanation for its decision to enforce the prescription on an annualized basis. It reasoned in a footnote that it adopted a calendar-year measure because carriers' revenues, expenses, and income tax liabilities are typically evaluated on a fiscal year basis, and AT & T's own fiscal year coincided with the calendar year. J.A. 25-26 n. 12. This explanation, while brief, is sensible enough, especially since the Commission was enforcing a prescription of an annual rate of return. Moreover, prescriptions usually remain in effect for an indefinite period. Under petitioners' preferred scheme, the Commission would never be able to find and remedy a violation until it opted to issue a new prescription, because the agency would not know until then over what period the prior prescription was in force. In short, while the Commission perhaps might have opted for a different interval of measurement, *cf. Authorized Rates of Return*, 50 Fed.Reg. 41350 (October 10, 1985) (two-year interval), its choice of the traditional calendar year certainly was not unreasoned.

Petitioners also urge that the FCC failed to meet its burden of adducing substantial evidence for its determination that AT & T earned a 10.22% return in 1978. The Commission, however, amply supported its decision to rely on the 10.22% figure in the IMR that AT & T filed in January 1979 rather than the 10.09% figure in the subsequent FDC Report. First, the Commission pointed out that the agency and the industry had relied on the IMR return figures for 28 years, whereas the FDC Reports first had been submitted in 1977. J.A. 25. Second, certain of the computations in AT & T's FDC Report relied on extrapolations from the month of June 1978, even though, in the Commission's opinion, AT & T had not shown that the June figures were perfectly representative of the year's earnings. *Id.* Thus, the Commission adduced substantial evidence for both its confidence in the traditional IMR and its lack of confidence in the FDC Report that AT & T urged the Commission to employ. We therefore have no cause to doubt the reasonableness of the Commission's reliance on the 10.22% figure.

Finally, intervenor United States Telephone Association argues that the Commission should not be able to require petitioners to pay interest on the excess earnings for the entire period between January 1, 1979, and the date on which carriers file traiffs to implement the refund. USTA believes the Commission abused its discretion in ordering full interest payments in light of the Commission's own prolonged delay in responding to the violation. While this court does not condone the Commission's delinquency in resolving this matter, *see Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C.Cir.1984), we perceive no inequity in requiring petitioners to pay full interest on earnings they had no right to retain in the first place.

III. Conclusion

The order under review was a straightforward and legitimate means for the Commission to enforce its 1976 rate-of-return prescription. In ordering a rate reduction in the amount of petitioners' excessive earnings, the Commission acted within its authority under the Communications Act and did not depart from prior policy. Finally, the Commission's method of computing the excess was reasonable and supported by substantial evidence. For these reasons, the petitions for review are denied.

It is so ordered.

BUCKLEY, Circuit Judge, dissenting:

Section 4(i) of the Communications Act is sufficiently broad and the principles of deference to agency decision-making sufficiently strong that, in the judgment of the majority, the FCC has statutory authority to enforce a prescribed maximum rate of return. Correct or not, the majority overstates the case. For more than fifty years, the Communications Act has been understood to establish a precise, express statutory scheme governing refunds and the setting of rates. Never before has section 4(i) been held to authorize refunds. While there is always a time for firsts, I think it must be admitted that, even if lawful, the FCC here operates at the feather edge of its statutory authority.

This is not the occasion to decide the statutory issue. Without notice, the FCC altered its fundamental policy basing rates of return exclusively on *current* market conditions, and instead ordered a reduction in future rates based on *past* surplus. The *Refund Order* should be set aside because it contradicts the system of ratemaking previously articulated and applied by the FCC.

I. Retroactivity Doctrine

In this circuit, as we have so recently confirmed, the test presented in *Retail, Wholesale & Dep't Store Union*

v. NLRB, 466 F.2d 380, 390 (D.C.Cir.1972), "provides the framework for evaluating retroactive application of rules announced in agency adjudications." *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 at 1081 (D.C.Cir. 1987) (en banc). Five "non-exhaustive" factors are set forth therein to distinguish between legitimate retroactive application of policy and those instances when an agency must proceed prospectively:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale, 466 F.2d at 390.

Taking the test in reverse order, I summarize my objection to the 1984 *Refund Order:* (1) Unlike the typical case in which an agency announces a rule through an adjudication, the FCC has formally and expressly admitted that the 1984 refund order "was not intended to establish a rule for all future proceedings. . . ." Return Interstate Services of AT & T Communications and Exchange Telephone Carriers, 50 Fed. Reg. 33,786, 33,788 (1985) (proposed Aug. 21, 1985). Instead, the FCC subsequently engaged in formal rulemaking to announce a policy of automatic refunds under specified circumstanes. Authorized Rates of Return for Interstate Services of AT & T and Exchange Telephone Carriers, 50 Fed. Reg. 41,350 (1985) (final rule); Return Interstate Services of AT & T Communications and Exchange Telephone Carriers, 51 Fed.Reg. 1,795 (1986) (to be codified at 47 C.F.R. Part 65). Hence the retroactive application of the policy in the present case advances *no statutory pur-*

pose; (2) The *Refund Order* imposes a $101 million penalty on AT & T plus interest for rates filed in 1976 and *never changed* until 1980. This is a burden by any standard. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295, 94 S.Ct. 1757, 1772, 40 L.Ed.2d 134 (1974) (prospective application favored when "fines or damages" are assessed and agency imposes new liability "for past actions which were taken in good-faith reliance on [agency] pronouncements."); (3) AT & T relied on the settled statutory scheme, confirmed in countless cases, that refunds, to be lawful, can only arise by operation of section 204 of the Communications Act. Furthermore, this court finds that were it not for section 4(i), the FCC order would be conclusively and without question unlawful. *See* Maj. at 1107, 1109; *see also MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1195 (D.C. Cir.1985) ("In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.") (quoting *American Telephone and Telegraph Co. v. FCC*, 487 F.2d 865, 880 (2d Cir.1973)); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 189 n. 7 (D.C.Cir.1986) (The Commission "may not order a retroactive refund based on a post hoc determination of the illegality of a filed rate's prescription."); (4) The FCC cannot and does not cite a single sentence from among hundreds of pages of its regulatory decisions detailing the policy upheld today. Rarely are departures from established policy as abrupt; (5) The majority states that "the Commission first prescribed a rate of return in 1972. Although it incorporated a rate-of-return recommendation, *the 1967 order was not a rate-of-return prescription*, and thus the portions of that order the dissent cites . . . are immaterial." Maj. at 1109 (emphasis

added). Yet the FCC in its own rulemaking expressly holds to the contrary:

> This Commission established a *prescribed* rate of return for the interstate telecommunications services of [AT & T *in 1967*]. That *prescription* was revised in 1972, 1976, and 1981.

50 Fed.Reg. at 33,786 (1985) (footnotes omitted); *see also* 57 F.C.C.2d 960, 960 (1976) ("This proceeding represents the third time [1967, 1972, & 1976] the Commission has considered the fair rate of return of [AT & T]. . . ."). As a matter of logic, it is untenable to argue that remedying an excess rate of return represents a case of "first impression." This is a core function of any rate regulator. As a matter of fact, the FCC twice before was confronted by AT & T rates in excess of the prescribed return. *See infra* at 1115-16.

It ultimately took the FCC six years to reach the conclusion that it (a) had the authority and (b) had given AT & T lawful notice that returns earned in excess of the prescribed rate of return would be subject to future disgorgement. The majority says this power came into being in 1972. The FCC nowhere in its brief or on the record makes this argument. Indeed, the alteration in the FCC position is dazzling. In 1967, the FCC said "the policies we are establishing on the basis of the record of this proceeding require no dastic change in any of the standards heretofore applied and represent no new or essentially different approach by this Commission to the regulation of respondents' interstate rates and earnings." 9 F.C.C.2d 30, 116 (1967). In its brief in the instant case, the agency said "[t]he fundamental flaw in the carrier parties' arguments in this case is that they either fail or refuse to recognize that the 1976 prescription order altered the normal pattern of carrier initiated rates under the Communications Act." Brief for Respondents at 17. At oral argument, counsel withdrew

this statement. In 1987, the FCC states that it first announced the refund policy in 1984, or perhaps as early as 1979 when it issued a notice calling for comments on the subject. Brief for Respondents at 47-48, 48 n. 62, *American Telephone and Telegraph Co. v. FCC*, Nos. 85-1778, *et al.* (argued before D.C.Cir. May 21, 1987).

Fortunately, an administrative record exists to sort out which of these various arguments were actually set down on paper to guide the conduct of the industry the FCC is charged with regulating.

II. THE RECORD

The FCC in 1984 ordered prospective rate reductions to compensate consumers for revenues earned by AT & T in 1978 based on tariff rates filed in 1976. The majority correctly describes this remedy as a policy of "prospective rate adjustment to compensate for past surpluses." Maj. at 1107. The majority incorrectly describes the remedy as a new policy meeting a novel set of circumstances.

FCC policy governing rate-of-return regulation is contained in the administrative rulings pertaining to changes in tariffs for AT & T in 1967, 1969, 1972, and 1976. 9 F.C.C.2d 30 (1967); 21 F.C.C.2d 654 (1969); 38 F.C.C. 2d 213 (1972); 57 F.C.C.2d 960 (1976). As I read these decisions, the FCC policy to remedy excessive tariffs consists of the exercise of agency authority at three successive stages: (a) pre-filing establishment of target revenues, (b) post-filing accounting pursuant to section 204 of the Act, 47 U.S.C. § 204, and (c) prospective rate adjustment, up or down, as demanded by the current economic forces in the marketplace. 47 U.S.C. § 205. The coordinated exercise of the agency authority in the first two stages in large measure eliminates the likelihood of overcharges. The option to reset future rates based on then-current conditions provides the vehicle to insure that rates continue to be appropriate over time.

As this schema assures adequate protection against excessive charges, the FCC has not been faced by a novel threat. Furthermore, FCC decisions amply document these propositions.

In 1967, the FCC adopted a new method for regulating telephone rates. Instead of working from a reconstruction of each cost component incurred by AT & T, a technical and time-consuming nightmare, the FCC settled on a top-down approach based on rate of return. The required rate of return, also known as the cost of capital, is that rate "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital," balanced against the public interest in just and reasonable rates. 9 F.C.C.2d at 53 (quoting the Supreme Court's "landmark" case, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 288, 88 L.Ed.2d 333 (1944)).

Conceptually, the cost of capital is divided into two components: the cost of debt, which is the interest rate enterprises must offer to attract secured funds; and the cost of equity, which is the rate of return investors must be offered to compensate them for the risk of investing in a company's stock. Because investors have numerous alternative investment prospects, the cost of capital approach to ratemaking necessarily focuses on the prospective return demanded by investors for investments of comparable risk. Thus, AT & T's cost of capital will change as necessary to reflect marketplace reassessments of these alternatives. If the rate of return earned by AT & T is set too low, it will not be able to attract either the debt or equity capital necessary to serve current consumers and meet future increases in demand. If set too high, the public interest suffers. *See, e.g.*, 9 F.C.C.2d at 52.

Rate regulation thus shifted in 1967 to a two-step process. The FCC would fix the target *rate of return*, and the carrier would set *tariff rates* designed to earn this

rate of return. In either system, whether before or after 1967, there is the risk of error. In the first, *historical* costs can be misestimated and long delays and expense incurred in gathering accurate data. In the second, the FCC has recognized, and therefore so must we, that there is an inherent imprecision to measuring the *prospective* and *changing* rate of return demanded in the marketplace and a further imprecision in then requiring the carrier to set tariff rates that will produce the exact level of revenues which, after expenses have been deducted and the rate base fixed, will produce the anticipated return. *See, e.g.*, 9 F.C.C.2d at 51-88; 38 F.C.C.2d at 248-51. The so-called "novel circumstance" of a surplus rate of return is in fact a central feature of rate-of-return regulation.

Notwithstanding these differences in the approach to setting tariff rates, only the means of regulation changed in 1967, not the basic policy. As noted, the FCC put this point beyond doubt:

> [T]he policies we are establishing on the basis of the record of this proceeding require no drastic change in any of the standards heretofore applied and represent no new or essentially different approach by this Commission to the regulation of respondents' interstate rates and earnings. On the contrary, the record and our decision confirm the regulatory standards we have generally aplied over the years. Thus, prior to 1964, we permitted the respondents to maintain a level of interstate earnings within the range of 7 to 7.5 percent. When the level of earnings tended to exceed this range, we were successful, under our program of continuing surveillance, in negotiating corrective rate adjustments.

9 F.C.C.2d at 116.

The decision also affirmed that "corrective rate adjustments" would continue to be the mechanisms employed to adjust for prior year excesses:

> As, and when, the going level of respondents' interstate earnings approaches either the upper or lower limits of this [7 to 7.5 percent] range, we will promptly consider what further action may be required *in light of then current conditions.* This is not to be construed to mean that any future level of earnings which exceeds 7.5 percent or falls below 7 percent will warrant immediate action *looking toward rate adjustments.* Whether or not remedial action will be required will depend upon *all the relevant circumstances obtaining at the time.*

Id. (emphases added).

When read in context, and in light of subsequent decisions, it is evident that "remedial action" contemplated the filing of revised tariff schedules designed to reduce or increase future rates in accordance with the rate of return appropriate to circumstances at that time. The cost of capital approach can make no sense otherwise. Investors lending funds or buying equity always focus on present alternative investments, not prior circumstances.

In 1970, AT & T filed a proposal to increase interstate charges on message telephone service by "some $760 million." 38 F.C.C.2d at 215. AT & T estimated the new charges would yield a rate of return approximating 9.5 percent, the rate required by current conditions according to AT & T. In the 1972 proceedings, the FCC specified "a range of 8.5-9.0% as the range of reasonableness for the earnings of Bell on its interstate operations at the tariff rates that we are allowing Bell to file herein." *Id.* at 245. This is the prospective rate adjustment system in action. Only after evaluating operating results and revenue requirements did the FCC translate the increase in *rate of return* into a permissible *tariff rate* increase designed to produce $145 million in *incremental revenue. Id.* at 248-51. In the decision, the FCC reiterates that adjustments in the system come through

prospective adjustments in tariff filings. *See id.* at 226-27.

Last, we reach the 1976 round of increases at issue in this case. AT & T, as usual, initiated the process in 1975 with a proposed $717 million rate increase. The FCC, exercising its prospective powers to control rates, determined the increase would exceed the rate of return then in place, and denied the proposal. 51 F.C.C.2d 619, 626-27 (1975). In other words, the policy functioned in 1976 exactly as designed—it prevented an increase in rates the FCC concluded to be unwarranted by then current conditions as measured by the rate of return.

The filing, however, prompted the FCC to investigate and update the rate of return applicable in 1976 from 8.5-9.0 percent to 9.5 percent, plus .5 percent as an efficiency incentive. 57 F.C.C.2d 960, 972-73 (1976). Once again, in accordance with its established practice, the FCC ordered a *prospective* adjustment in the target increase for revenues. Moreover, by suspending the 1976 tariff filing for one day, the FCC triggered its statutory authority to control rates *retroactively* pursuant to section 204 of the Act, which states in pertinent part:

> [U]pon completion of the hearing and decision [the FCC] may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose benefit such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified.

47 U.S.C. § 204(a) (1982). Although the agency did not see fit to pursue the section 204 remedy in this case, the essential point in terms of the regulatory regime is that the agency is empowered by the statute to conduct an accounting of actual results and, after a hearing, order a refund if necessary to reimburse consumers who had paid excessive charges.

III. Application To Retroactivity

This survey of the relevant FCC decisions compels the conclusion that the FCC's 1984 refund order abruptly reversed its prior policy by basing prospective tariff rates on prior returns in excess of the target levels, instead of on market conditions. Until 1984, the FCC's regulation of AT & T's rates was based *exclusively* on a foreward-looking assessment of economic conditions. After 1984, the FCC order holds that rates may be reduced to compensate for past experience. The majority neatly encapsulates this abrupt switch by describing the new refund policy as a "*prospective rate adjustment* to compensate *for past surpluses.*" Maj. at 1107 (emphasis added).

A. *Novel Circumstance*

The majority seeks to justify the refund policy as a licit response to novel circumstances. In the first instance, this premise of novelty stretches the facts. In 1967, the FCC established a rate of return in the range of 7 to 7.5 percent. Based on this rate, the FCC calculated that AT & T's rates then in place were excessive. The remedy ordered was to reduce future rates to produce a $120 million reduction in revenues. At the new rate level, AT & T would earn the rate of return required by then current conditions. It was never suggested that the return should be lowered by $120 million to reflect current conditions, and then *further* reduced to collect the past overage. *See* 9 F.C.C.2d at 116.

Likewise, the agency in 1969 determined that actual charges in 1967 exceeded the allowed rate of return. 21 F.C.C.2d at 655. Again, the FCC neither ordered nor contemplated refunds. Rather, it expressed the familiar policy that "when there were departures from this range, [it would] consider the matter in light of conditions obtaining at that time." *Id.* The FCC thereupon reviewed the excess earnings on the basis of "changes which have taken place *since 1967* in the economic, financial, and

other conditions that affect AT & T's revenue requirements and its ability to attract new capital"; and concluded that earnings exceeding the 1967 rate of return "[were] not unreasonable." *Id.* (emphasis added). AT & T was not required to reduce its filed tariffs.

The rate-of-return method of regulation was new in 1967, and, according to the majority, the rate-of-return prescription did not fix a maximum cap on the allowable return until 1972. This claim of a major sea-change in the 1972 proceeding is contradicted in the record, *see supra* at 1114-15, disavowed by the FCC, Brief for Respondents at 19 ("The [1976] rate of return prescription enforced in this case, like every other such prescription the FCC has made, was implemented . . . with prospective, binding effect." (footnote omitted)), and unsupported by the *Nader* decision. *See* 50 Fed.Reg. at 33,786 n. 1("The *Nader* opinion interpreted prior FCC decisions [back to 1967] as prescribing a rate of return for AT & T . . . ."). In any event, in terms of the assertion of novelty, these are distinctions without a difference. The FCC even in the pre-1967 regime used rates of return to evaluate the revenues allowed after costs. Moreover, the regime between 1967 and 1972 prescribed rates and hence presented the precise issue whether the increment over the targeted rate of return should be retained. Pursuant to the majority's logic, the FCC had the authority to order prospective rate adjustments as the enforcement remedy. The fundamental fact is that the agency twice before explicitly faced the problem of actual charges in excess of the announced range.

Second, common sense rebuts the majority's contention. It cannot be argued that the FCC simply failed to anticipate the essential issue of rate regulation, namely, what steps the agency should take to ensure compliance with its rate-of-return orders. In a system of carrier-initiated rates, it is unreasonable to suppose that the agency

established the rate-of-return framework without giving a single thought to the prospect of what would happen if the filed tariffs produced a return in excess of the allowed maximum.

Finally, the FCC concedes, as it must, that not a single sentence in any report suggested that prospective rate adjustments might be ordered to compensate for past surplus. The omission would be almost inexplicable in a system of rate regulation that inherently can produce errors resulting in overshooting or undershooting the targeted rate of return. The FCC's three coordinate powers, as summarized below, explain the silence that the majority inaccurately construes to be evidence of a novel circumstance.

As part of the process setting the rate of return, the FCC approves or disapproves specific requests for target increases in tariff *revenues*. The revenues analysis is conducted to confirm that AT & T's probable earnings will fall within the range of the targeted rate of return. The agency's advance control over tariff rates minimizes the risk that AT & T will generate unauthorized revenues. The power to call for an accounting and order a refund allows the agency to remedy excessive returns that occur after the fact. Finally, if, as here, rates already approved subsequently produce higher than anticipated returns, the FCC can respond by analyzing present conditions to determine if the higher return is appropriate. If not, the Commission can order the carrier to file reduced tariffs targeted to meet the lower rate of return required by current circumstances.

Thus, in the present case, the FCC observed that the tariffs produced a return of 9.25 percent in 1976, confirming that the target limitation on increased revenues operated as anticipated. Hence there was no need to continue the section 204 process. In 1977, the tariffs produced a 9.59 percent return. Only in 1978 did the unchanged tariffs produce the .22 percent surplus.

It has taken the agency six years to come to the conclusion that its policy necessarily allows it to reduce future rates to remedy the situation. Based on the policy in effect when AT & T filed its tariffs, however, the FCC should have determined whether the conditions in 1978 and thereafter warranted a prospective reduction in rates. The relevant circumstances for analysis would have included the fact that (1) in an inherently imperfect regime, the excess amounted to less than one-fourth of one percent; (2) the 1976 tariff rates produced a return below 10 percent in every year other than 1978; (3) the rate of return for the entire period 1976 to 1980 averaged 9.69 percent; (4) the governing rate of return was implemented in 1976 based on economic conditions obtaining in 1975; and (5) the relevant period for analyzing prospective rates, if the FCC had acted in timely fashion, would have been in 1979 or soon thereafter.

Whatever the outcome of this analysis, the fundamental point is clear. The FCC would have asked whether the overage signaled a need to reset tariff rates based on current conditions. The 1984 order confirms at a minimum that the rate of return established in 1976 continued to apply in 1978. Therefore, had AT & T in fact lowered rates in 1979 in response to the .22 percent excess in 1978, they would have realized a shortfall below even the allowed 10 percent rate of return (i.e., at the unchanged rates, the 1979 annual rate of return was 9.90 percent).

In sum, the FCC cannot cite a single passage in its regulatory decisions forecasting the refund policy announced in 1984. *See* Brief for Respondents at 22-26. The record documents two prior instances in which actual rates exceeded the target rate of return. Most important, the 1984 order—reducing future rates based on past surplus—contradicts the central premise of the FCC's rate-of-return regulation as a forward-looking assessment of capital needs, instead of an historically based estimation

of actual costs. In these circumstances, the FCC violated the well-established prohibition against retroactive application of a newly announced policy. *See Boston Edison Co. v. FPC*, 557 F.2d 845, 849 (D.C.Cir.), *cert. denied sub nom. Town of Norwood, Mass. v. Boston Edison Co.*, 434 U.S. 956, 98 S.Ct. 482, 54 L.Ed.2d 314 (1977); *FERC v. Triton Oil and Gas Corp.*, 750 F.2d 113, 116 (D.D.Cir.1984).

B. *Reliance*

The prohibition applies with special force when, as here, the party subject to the change has relied to its detriment on the prior policy. Whereas the majority is unable to find any such reliance, I believe the reliance is self-evident. Prior to today's ruling, AT & T had every reason to believe that section 204 provided the only statutory mechanism for ordering a retroactive refund. The FCC concedes that this section does not apply here. Therefore, the only other provision that could arguably provide such authority, section 4(i) aside,[1] is the section 205 authority to set "just and reasonable [rates] . . . to be *thereafter* observed," 47 U.S.C. § 205(a) (emphasis added); *cf.* the regulatory analog in section 206 of the Federal Power Act, 16 U.S.C. § 824e(a), and section 5 of the Natural Gas Act, 15 U.S.C. § 717d(a).

By long-established principle, these three parallel statutory provisions "bar[] utility refunds for past excessive rates, or the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." *City of Piqua, Ohio v. FERC*, 610 F.2d 950, 954 (D.C.Cir.1979); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578, 101 S.Ct. 2925, 2931, 69 L.Ed.2d 856 (1981); *Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d

[1] "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (1982).

336, 345 (D.C.Cir.1974), *cert. denied*, 420 U.S. 946, 95 S.Ct. 1326, 43 L.Ed.2d 424 (1975). While the majority finds that section 4(i) could support the particular remedy ordered here in the future, it is evident that prior to this ruling AT & T could reasonably have believed that sections 204 and 205, and the analogs in the electric and gas industry, contained the relevant statutory framework. As the FCC concedes, *see* AT & T Earnings on Interstate and Foreign Services During 1978, 49 Fed.Reg. 49,502, 49,507 (1984), and the panel holds, maj. at 14, this framework provides no authority for the 1984 refund order.

The majority believes AT & T should have foreseen the true novelty here, namely, the location of refund power in the section 4(i) authorization to perform such acts "as may be necessary in the execution of its function." 47 U.S.C. § 154(i). This first use of section 4(i) to authorize the 1984 refund does not void the FCC's construction of the statute. *Bankamerica Corp. v. United States*, 462 U.S. 122, 131, 103 S.Ct. 2266, 2272, 76 L.Ed.2d 456 (1983) ("[a]uthority actually granted by Congress . . . cannot evaporate through lack of administrative exercise." (quoting *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352, 61 S.Ct. 580, 582, 85 L.Ed. 881 (1941))). It does mean, however, that persons subject to enforcement proceedings can reasonably rely "on what was universally perceived as plain statutory language," *id.* at 133, 103 S.Ct. at 2273, or, as here, the plain statutory scheme. *See National Classification Comm. v. United States*, 746 F.2d 886 (D.C.Cir.1984) (agency cannot retroactively expose carriers to antitrust liability for reasonable reliance on a settled prior construction of an agreement).

Other factors independently demonstrate AT & T's reliance. Absent notice of the refund policy, the carrier went five years without a change in its tariff even though it could have increased its revenues in every year except 1978 without exceeding the 10 percent rate of return

limit. The increased revenues would have more than offset the $101 million rate reduction ordered here. Moreover, although the agency in 1984 held that conditions in 1978 fell "within the correlative range of economic and financial market conditions," considered in 1976, 49 Fed. Reg. at 49,506 n. 34, a quick perusal of the FCC opinions fixing the appropriate rate of return in a given period indicates the subject admits to less than scientific certainty. For example, the decisions document the multiple assumptions used to compile this deceptively simple rate-of-return figure and the multiple underlying debates among economists over the proper measurement of the cost of debt and equity. *See, e.g.*, 9 F.C.C.2d at 72-86; 38 F.C.C.2d at 226-46; 57 F.C.C.2d at 962-72.

In this context, the FCC's post-hoc determination in 1984 that 1976 economic conditions still prevailed in 1978 does not mean the agency would have necessarily rejected a .22 percent increase in the allowable rate of return if vigorously pressed and documented at the time by AT & T. With such large sums of money at stake, I believe the majority is unduly formalistic when its asserts as fact that AT & T would not have behaved any differently even with explicit knowledge that a .22 percent overshoot in its calculated rate of return would produce a $101 million refund order.

C. *Inherent Remedy*

A final justification relied upon by the FCC, *see* Brief for Respondents at 23, and the majority, maj. at 1109, is that the rate-of-return prescription inherently encompasses the remedy of setting a rate of return appropriate to say 1985, but then reducing that rate by a fixed sum (here $101 million plus $77 million in interest) to adjust for past surplus. FCC practice has been otherwise. FCC decisions describe a contrary system. No other regulators have seen fit to follow this system. Indeed, the FCC only began using the word "prescription" in 1973, in a dis-

cussion to which it attached no special significance, six years after adopting a policy that "represent[s] no new or essentially different approach" to rate regulation. 9 F.C.C.2d at 116. *See* 42 F.C.C.2d 293, 300 (1973); 51 F.C.C.2d at 625 n. 12. To the extent the word has application here, it is to signify that the rate of return prescribes the allowable rate of return. This court said no more in *Nader v. FCC*, 520 F.2d 182 (D.C.Cir.1975). Now the FCC claims long after the fact that a prescriptive rate-setting regime silently conveys the additional prospect of an enforcement policy reducing prospective rates to remedy past surplus. In these circumstances and in light of the FCC's insistence that rates relate exclusively to current conditions. I believe the Supreme Court has pronounced decisively. The 1984 enforcement scheme "is too unprecedented a departure from the conventions of ratemaking to rest on mere inference." *Transcontinental & Western Air, Inc. v. CAB*, 336 U.S. 601, 607, 69 S.Ct. 756, 759, 93 L.Ed. 911 (1949).

D. *The Rulemaking Order*

The posture of this case would be substantially altered if the FCC were arguing its right to engage in rulemaking in an adjudicatory setting. Yet here we have the anomalous circumstance that the refund order directed at AT & T was expressly a single party adjudication. *See supra* at 1112. The subsequent decision to engage in prospective rulemaking conclusively establishes that the FCC has no statutory interest in the outcome of this particular case. *Cf. Triton Oil*, 750 F.2d at 116 ("The Commission may not abuse its discretion by arbitrarily choosing to disregard its own established rules and procedures in a single, specific case."). In the context of *Retail, Wholesale*, the substantive rationale for allowing retroactive rulemaking is sharply diminished.

Moreover, pursuant to the actual rules adopted, *AT & T would most likely not be liable for a "refund" in the*

instant case. Specifically, the Commission, in its preliminary rulemaking, recognized the "inability of carriers 'to target their earnings with precision' as a result of 'unpredictable factors.' *The Commission recognized that 'disallowing any earnings 'peaks,' while ignoring the 'valleys,' would tend to induce a systematic bias that would cause a carrier to fall short of its targeted rate of return over the long run.'*" Brief for Respondents, Nos. 85-1778, *et al.* at 11 (citations to record omitted) (emphasis added).

The final rules establish several specific provisions to deal with the inherent fluctuation in return, i.e., the precise issue of this case. *See id.* at 31-34. Significantly, the measuring period for the return is two years, not one. AT & T earned 9.59 percent in 1977 and 10.22 in 1978, which produces a two-year average return of 9.91 percent. Moreover, the two-year provision allows for "mid-course corrections, thereby lessening the possibility that the enforcement mechanism would have to be invoked." *Id.* at 13 (citations to record omitted). AT & T, of course, was given no such opportunity to make corrections in the present case. Indeed, it is startling that under the new rules, A T &T is expressly allowed to filed increases if actual earnings are below the prescribed return during the first year. *Id.* at 33. Had AT & T been allowed the benefit of this procedure, it could have raised rates in 1976 (9.25 percent actual), 1977 (9.59 percent), 1979 (9.90 percent), and 1980 (9.90 percent) and still been below the allowable ten percent ceiling. With perfect targeting, AT & T would have earned an additional 1.36 percent, less the .22 percent surplus in 1978 for a net gain of 1.16 percent. If a .22 percent overcharge resulted in a $101 million refund order, AT & T actually could have charged approximately an additional *half-billion dollars* during this period without violating the established, lawful rate of return.

IV. Conclusion

The FCC has the statutory authority to insure that actual rates filed are likely to fall within the required range (by targeting the allowable revenue increment pursuant to section 205), and that the rates in fact do fall within the range (via a section 204 accounting). Over time the FCC can force prospective adjustment in rates by lowering or raising the allowed rate of return, as required by current economic conditions. Notwithstanding this comprehensive program, the majority credits the FCC with a policy that cannot be found in the record. The opinion further ignores the carrier's reliance upon the statutory refund scheme as it existed in 1978, and rejects outright the prospect that hundred million dollar refund orders would sharpen the carrier's interest to earn all revenues to which it was entitled. Finally, the majority ignores the implications of the FCC's subsequent decision to engage in formal rulemaking. Application of well-established retroactivity doctrine requires that the 1984 *Refund Order* be set aside. I respectfully dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1243

COMMUNICATIONS SATELLITE CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

Before: Wald, Chief Judge; Edwards and Silberman, Circuit Judges

ORDER

[Filed Feb. 2, 1990]

Upon consideration of Petitioner's Petition for Rehearing it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1243

COMMUNICATIONS SATELLITE CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed Feb. 2, 1990]

Petitioner's Suggestion For Rehearing *En Banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Buckley, Williams and Sentelle would grant the suggestion for rehearing *en banc*.

Circuit Judges Ruth B. Ginsburg and D. H. Ginsburg did not participate in this order.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1087

NEW ENGLAND TELEPHONE and TELEGRAPH COMPANY *et al.*,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents

and consolidated cases

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg*, Starr, Silberman*, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed Nov. 2, 1988]

Petitioners' Suggestion for Rehearing *En Banc* has been circulated to the full court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

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* Circuit Judges Ruth B. Ginsburg and Silberman did not participate in this order.

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A dissenting statement of Circuit Judge Starr, in which Circuit Judges Williams and Buckley join, is attached.

A separate statement of Circuit Judge D. H. Ginsberg is also attached.

A separate statement of Circuit Judge Sentelle is also attached.

STARR, *Circuit Judge,* joined by WILLIAMS and BUCKLEY, *Circuit Judges, dissenting from denial of rehearing en banc*: The fundamental issue presented in these cases is of manifest importance. Not only are the economic stakes staggeringly high, but the FCC has expansively asserted a recently discovered power enshrouded for a half century in the mists of the Communications Act of 1934. This recent discovery at 19th and M Streets represents yet another example in the long and dreary line of bureaucratic excesses in our system of limited government. The FCC has, in brief, purported to exercise a power which Congress never conferred upon it; what is worse, the Commission's clawback approach and mandating of the maximum rate of return do violence to well-settled, salutary doctrines, such as the bar on retroactive ratemaking and the filed rate doctrine. In the process, the Commission's ratemaking revolution flies in

the teeth of the twin virtues of stability and predictability which rate regulatory regimes are designed to foster.

The errors complained of are, in short, profound. Unfortunately, as the order denying the suggestion indicates, a number of our judges have not been able to participate in evaluating the merits of what I believe to be a compelling demonstration by Comsat and other telecommunications firms that the *New England* majority was badly wrong. This substantial shortage in judicial personnel has virtually foreordained that this issue cannot now be afforded the *en banc* treatment that it so plainly deserves. Under these circumstances, the state of the law in this circuit on a pivotal statutory issue cutting across agency lines can only be regarded as distressingly unsettled until the question arises in a context where the court can truly turn its full evaluative powers to the question at hand.

Separate Statement of Circuit Judge D. H. GINSBURG: As I was not a member of the panel in either of these cases and, therefore, did not receive the benefit of plenary briefs and oral argument, I am not in a position to speak with the conviction expressed by Judge Starr. I do not doubt, however, that the issues raised by his thoughful statement warrant examination by the court *en banc*.

Separate Statement of Circuit Judge DAVID B. SENTELLE:

I do not intend by joining in the vote to deny rehearing *en banc* to imply a position on the merits of *en bancing* this controversy. Rather, it appears to me that a case with multiple recusals is a particularly poor vehicle for re-visiting a recurring question of Circuit law.

APPENDIX F

STATUTORY PROVISIONS

Relevant Sections of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, *et seq.* are as follows:

Section 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in

particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

Section 204. Hearings on new charges; suspension pending hearings; refunds; duration of hearing; appeal of order concluding hearing

(a) (1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without com-

plaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2) (A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 12 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective, or within 15 months

after such date if the hearing raises questions of fact of such extraordinary complexity that the questions cannot be resolved within 12 months.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

Section 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges, to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the

carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Section 4(i). Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.